Supreme Court, U.S.
FILED

061006 JAN 22 2007

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No.

IN THE

Supreme Court of the United States

UNIVERSITY OF PHOENIX,

Petitioner,

v.

UNITED STATES EX REL. MARY HENDOW AND JULIE ALBERTSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Participants in many federal programs, including the student financial aid program under Title IV of the Higher Education Act, must satisfy hundreds of regulatory requirements to establish their program eligibility. In direct conflict with the decisions of five other circuits, the Ninth Circuit held that any alleged "course of conduct" that knowingly violates one of these program eligibility requirements is sufficient to render an otherwise truthful claim for payment "false or fraudulent" under the False Claims Act, even if the government has not conditioned payment on compliance with that requirement. The question presented is whether an allegation that a claimant has knowingly violated a regulatory requirement that constitutes a threshold condition of program eligibility—rather than a condition of government payment—is sufficient to state a claim under the False Claims Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that the University of Phoenix, Inc. ("UOP") is a wholly owned subsidiary of Apollo Group, Inc. No other publicly held company owns 10% or more of UOP's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner University of Phoenix, Inc. ("UOP") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 461 F.3d 1166. Pet. App. 1a. The order denying UOP's petition for rehearing and petition for rehearing en banc is unreported. *Id.* at 24a. The opinion of the United States District Court for the Eastern District of California is unpublished but is electronically reported at 2004 WL 3611690. *Id.* at 20a.

JURISDICTION

The district court had jurisdiction over respondents' claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on September 5, 2006. It denied UOP's timely petition for rehearing and petition for rehearing en banc on October 24, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 31 U.S.C. § 3729 provides, in relevant part:

§ 3729. False claims

(a) Liability for certain acts. Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government . . .

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

STATEMENT

This case raises several issues of exceptional importance to the administration of federal government programs involving hundreds of billions of dollars and, specifically, to the application of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, to participants in those programs. Notwithstanding this Court's admonition that the FCA "was not designed to reach every kind of fraud practiced on the Government," *United States v. McNinch*, 356 U.S. 595, 599 (1958), the Ninth Circuit has effectively transformed the statute into a general remedy for *any* knowing regulatory violation in connection with *any* federal benefit program—a result that contradicts this Court's teachings and the holdings of several other courts of appeals. The decision below exposes government contractors—including, for example, those in the education, health-care, and defense industries—to the specter of staggering liability and enormous settlement pressure based on FCA claims pursued by private plaintiffs without the supervision of the United States government.

In direct conflict with decisions from other circuits recognizing that a plaintiff seeking recovery under the FCA must allege either that the claimant made a false representation regarding a condition of payment or that the claimant promptly and substantially failed to comply with a promise made to obtain program eligibility, the Ninth Circuit held that *neither* a false statement pertaining to a condition of payment *nor* prompt and substantial noncompliance with a condition of eligibility need be alleged to state an FCA claim.

Under the Ninth Circuit's expansive construction of the FCA, any allegation that a claimant engaged in a knowing "course of conduct" that violated any condition for establishing eligibility to participate in a federal benefit program is sufficient to state a claim under the FCA. Pet. App. 13a. Contrary to the FCA's plain language, which prohibits the use of fraud to "get a . . . claim paid," rather than to obtain program eligibility, 31 U.S.C. § 3729(a)(2), this decision converts an alleged violation of any of the thousands of regulations that govern participation in federal benefit programs into a potential FCA claim, and displaces other statutory and regulatory regimes designed to redress regulatory noncompliance and acts of fraud against the federal government.

Certiorari is warranted to restore the reasonable limitations that Congress imposed on the scope of the FCA and to resolve the lower courts' uncertainty regarding the statute's parameters.

1. The FCA was enacted in 1863 in response to extensive acts of fraud that military contractors perpetrated upon the federal government during the Civil War. As amended, the statute currently provides the federal government with a remedy for the submission of "false or fraudulent claims" for payment. 31 U.S.C. § 3729(a)(1), (a)(2). An FCA action can be initiated either directly by the United States or by a private person—known as a "relator"—asserting a *qui tam* action against the alleged false claimant "in the name of the Government." *Id.* § 3730(b)(1). If an FCA action is commenced by a relator, the complaint must be filed under seal and delivered to the United States, which has 60 days to review the complaint and determine whether to intervene and assume primary responsibility for prosecuting the action. *Id.* § 3730(b)(2). If the United States declines to intervene, then the relator retains the exclusive right to pursue the FCA claim. *Id.* § 3730(b)(4).

A claimant found liable under the FCA is subject to a civil penalty of between $5,500 and $11,000 per claim, as well as treble damages. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9). The relator is entitled to share in any recovery with the United States: if the United States does not intervene, the relator receives between 25 and 30 percent of the recovery; if the United States does intervene, then the relator's share is generally between 15 and 25 percent. 31 U.S.C. § 3730(d)(1)-(2).

The "archetypal" FCA action is premised on a claim for government payment that is expressly false—for example, an invoice submitted to the government for work that the claimant knows was never performed or was performed deficiently. *See, e.g., United States v. Bornstein*, 423 U.S. 303, 307 (1976). With only infrequent guidance from this Court, the lower federal courts have developed several other theories of FCA liability. Under the "false certification" theory, FCA liability may be predicated upon an express false certification of compliance with a statutory or regulatory requirement that is a condition of receiving a government benefit. *See, e.g., United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997). In "rare circumstances" (*United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996)), FCA liability may also be based on the so-called "promissory fraud" theory, which applies where a claimant uses fraud to obtain eligibility to participate in a government program—for example, by using a bid-rigging scheme to obtain a government contract. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543 (1943).

2. UOP is the largest private university in the United States. It currently enrolls more than 200,000 students at 76 campuses (including its online learning facilities) and 119 educational centers in 37 States. UOP's primary mission is to provide adults with the opportunity to continue their education and develop the skills essential to professional suc-

cess. Both the federal government—including the Army, Navy, Marines, and FBI—and a number of major corporations—including Boeing and Ford Motor Co.—recommend UOP to employees who are required, or who elect, to take continuing education classes, and reimburse employees for their UOP tuition.

UOP participates in the federal financial aid program established under Title IV of the Higher Education Act ("HEA"). UOP must adhere to an extensive set of statutory and regulatory requirements to maintain its eligibility to participate in the Title IV financial aid program—many of which have nothing to do with any claim for payment from the government. *See, e.g.*, 34 C.F.R. § 668.46(b) (requiring participating institutions to prepare an annual campus security report); *id.* § 668.47(c) (requiring institutions to prepare an annual report on athletic program participation). "In order to be an eligible institution for the purposes" of Title IV, UOP is also required to execute a multi-year Program Participation Agreement ("PPA") with the United States Department of Education. 20 U.S.C. § 1094(a). The PPA sets forth additional conditions for establishing eligibility to participate in the Title IV program and reiterates a number of the statutory and regulatory requirements that govern the program. *See id.* (the PPA "shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance" with its terms).

In the PPA, UOP agrees, among other things, that it "will not provide . . . any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments." Pet. App. 34a; *see also* 20 U.S.C. § 1094(a)(20) (codifying this restriction); 34 C.F.R. § 668.14(b)(22)(ii)(A) (authorizing the payment of salaries to recruiters provided that salary adjustments are not "based *solely* on the number of students recruited, admitted, enrolled, or awarded financial aid") (emphasis added). If an institution violates this restriction on so-called "incentive

compensation," it may be liable for civil penalties of up to $27,500 per violation, 20 U.S.C. § 1094(c)(3)(B)(i); 34 C.F.R. § 668.84, temporarily lose its eligibility to participate in the Title IV program, *id.* § 668.85, or be terminated from the program altogether. *Id.* § 668.86.

3. Relators were employed as admissions counselors at UOP at the time they initiated this FCA suit. They alleged that UOP violated the restriction on incentive compensation by paying admissions counselors salaries based solely on the number of students they enrolled. Relators contended that, as a result of this alleged regulatory violation, the Title IV financial aid applications that UOP submitted on behalf of its students constituted "false claims" within the meaning of the FCA. Specifically, relators alleged that UOP falsely certified compliance with the restriction on incentive compensation when it signed the PPA. In the alternative, relators asserted that, even if the PPA did not constitute a "certification" for purposes of the false certification theory of FCA liability, UOP was liable under the promissory fraud theory because it allegedly entered into the PPA without ever intending to comply with the restriction on incentive compensation.

Relators filed their complaint under seal, and the United States declined to intervene. After the complaint was filed, the Department of Education began a program review of UOP's recruiting practices. That review culminated in a settlement agreement in which UOP did not admit any liability. The agreement did not require UOP to repay any of the financial aid received by its students, change any of its practices for compensating admissions counselors, or discipline any of its employees. This result is consistent with a Department of Education memorandum concluding, notably, that violations of the restriction on incentive compensation do not cause the government monetary loss and do not necessarily preclude an educational institution from participating in the Title IV HEA program. Pet. App. 52a.

4. UOP moved to dismiss the relators' complaint on the ground that they had failed to state a claim under either the false certification or promissory fraud theories of FCA liability. The district court granted UOP's motion to dismiss because it concluded that relators had "not identified any certification which is a prerequisite for UOP to receive federal funds." Pet. App. 22a.

The Ninth Circuit reversed. The court of appeals concluded that relators had stated a claim under the false certification theory because, according to the court, the certification requirement can be satisfied either through a "false statement" or through a "fraudulent *course of conduct*" that violates a statutory or regulatory requirement. Pet. App. 13a (emphasis added). Contending that there "is no reason to innoculate [sic] institutions of higher education from [FCA] liability when they *knowingly* violate a regulatory condition," *id.* at 14a, the court of appeals held that relators' false certification claim can proceed based on their allegation that UOP knowingly paid its admissions counselors enrollment-based salaries proscribed by the restriction on incentive compensation. *Id.* The court reached this conclusion even though it recognized that "compliance with the incentive compensation ban is a necessary condition of continued *eligibility* and *participation*" in the Title IV program, *id.* at 16a (emphases added), rather than an express condition of receiving and retaining financial aid payments under Title IV once threshold eligibility has been established. The court of appeals expressed concern that if this condition of eligibility were not deemed sufficient to support an FCA claim, UOP "would be virtually unfettered in its ability to receive funds from the government while flouting the law." *Id.* at 17a.

The Ninth Circuit further concluded that relators had stated a claim under the promissory fraud theory of FCA liability. According to the court of appeals, to survive a motion to dismiss a promissory fraud claim, a complaint need allege only a "false or fraudulent course of conduct, made

with scienter" (Pet. App. 13a), and, here, relators had adequately alleged that UOP never intended to comply with its representation in the PPA that it would adhere to the restriction on incentive compensation. *Id.* at 14a.

REASONS FOR GRANTING THE PETITION

This Court has only infrequently provided the lower courts with authoritative guidance regarding the scope of the FCA. Indeed, the false certification and promissory fraud theories of FCA liability, upon which the decision below rests, were developed by the lower federal courts without any meaningful instruction from this Court. As a result, the circuits are now sharply divided regarding the elements necessary to state a claim under these theories of FCA liability. The Ninth Circuit's expansive reading of the FCA—which essentially transforms the statute into a general remedy for any knowing violation of a federal program's regulatory requirements—exacerbates this circuit split and directly conflicts in a number of significant respects with other circuits' narrower interpretations of the FCA. This Court's review is warranted to reconcile these sharply divergent readings of the FCA and to ensure that—consistent with this Court's teachings—litigants and lower courts do not distort the statute in an effort "to reach every kind of fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958).

The circuits are starkly divided on the question whether a false certification claim under the FCA can be premised on fraud in connection with a threshold condition of program eligibility or must instead be based upon fraud that relates to a condition of receiving payment from the government. The Ninth Circuit's holding that relators can proceed on their false certification claim based simply on UOP's alleged fraudulent violations of the restriction on incentive compensation—a condition to which UOP must adhere to establish eligibility to participate in the Title IV financial aid pro-

gram—cannot be reconciled with decisions from the Second, Fourth, and Fifth Circuits holding that an allegation of fraud in connection with a condition of payment is a prerequisite to a false certification claim.

The Ninth Circuit's expansive reading of the FCA disregards the statute's plain language, which is directed toward fraud used to "get a . . . claim paid," rather than to obtain program eligibility. 31 U.S.C. § 3729(a)(2). As the Second Circuit has explained, and this statutory language confirms, the "False Claims Act was not designed for use as a blunt instrument to enforce compliance with all . . . regulations—but rather only those regulations that are a precondition to payment." *Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001). Moreover, by extending the FCA to encompass fraudulent conduct in connection with any of the extensive regulations that typically govern participation in federal benefit programs, the Ninth Circuit's decision renders superfluous other statutory and regulatory regimes that address fraudulent activity in specific federal programs. As a result, contractors that do business with the federal government are now confronted with the alarming prospect of potentially bankrupting FCA liability premised on allegations of fraud pertaining to obscure regulatory and contractual provisions unrelated to their right to receive payment from the government. *See, e.g.*, 34 C.F.R. §§ 668.46(b), 668.47(c) (requiring institutions participating in the Title IV program to prepare annual campus security and athletic program participation reports); Pet. App. 45a (requiring institutions to operate a drug abuse prevention program). To avoid the possible assessment of civil penalties of up to $11,000 per claim, as well as treble damages, defendants will face intense pressure to settle even the flimsiest of these false certification claims.

The need for this Court's review is compounded by the Ninth Circuit's holding that an alleged fraudulent "course of conduct" is sufficient to state a false certification claim—a conclusion that conflicts with decisions from the Second and

Third Circuits holding that a false representation is required—and by its rejection of the stringent pleading requirements that other circuits have imposed on promissory fraud claims under the FCA. These features of the Ninth Circuit's decision further extend the FCA into areas of conduct that are properly within the ambit of other statutory and regulatory regimes, and increase the likelihood that government contractors will be compelled to pay extortionate settlements to relators pursuing FCA claims that Congress never intended to authorize.

It is well-established that "enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." *Fid. Fed. Bank & Trust v. Kehoe*, 126 S. Ct. 1612, 1612 (2006) (Scalia, J., concurring in denial of certiorari). Because the question presented by this case has profound financial ramifications for *all* entities that contract with, or receive funds from, the federal government, the petition for a writ of certiorari should be granted.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THE SECOND, FOURTH, AND FIFTH CIRCUITS HOLDING THAT FRAUD IN CONNECTION WITH A CONDITION OF PAYMENT IS A PREREQUISITE TO A FALSE CERTIFICATION CLAIM.

This Court has never considered the parameters of the false certification theory of FCA liability. As a result, a sharp disagreement has emerged among the circuits regarding whether a false certification claim must be premised on fraud that pertains to a condition of receiving payment from the government, or whether it is sufficient to plead fraud in connection with a condition for establishing threshold eligibility to participate in a federal program. The Ninth Circuit's rejection of the legal distinction between conditions of pay-

ment and conditions of eligibility conflicts with decisions from *three* other circuits.

1. The Ninth Circuit held below that the restriction on incentive compensation could serve as the basis for a false certification claim, even though the statutes and regulations governing the Title IV program confirm that compliance with the restriction is a threshold condition of eligibility to participate in the Title IV program, rather than a condition of payment. *See* 20 U.S.C. § 1094(a) (listing the restriction on incentive compensation as a "condition" to the "initial and continuing eligibility of an institution to participate in a program" under Title IV of the HEA); 34 C.F.R. § 668.14(a)(1) ("initial and continued participation" in the Title IV program is "condition[ed]" on the requirements set forth in the PPA). The Ninth Circuit opined that separating conditions of threshold eligibility from conditions of payment "is a distinction without a difference." Pet. App. 16a.

The Seventh Circuit reached a similar conclusion in *United States ex rel. Main v. Oakland City University*, 426 F.3d 914 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1786 (2006), where the court explicitly rejected the distinction between conditions of eligibility and conditions of payment in the Title IV context and reinstated an FCA promissory fraud claim premised on alleged violations of the restriction on incentive compensation. *Id.* at 916. In explaining its refusal to recognize a legally meaningful difference between threshold conditions of program eligibility and those conditions on which payment is expressly conditioned, the Seventh Circuit asserted that, as long as "a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork." *Id.*

These cases directly conflict with decisions from the Second, Fourth, and Fifth Circuits holding that, in order to state a claim under the false certification theory of FCA li-

ability, a plaintiff must allege that the claimant falsely certified compliance with a requirement that is a condition of receiving payment from the federal government.

In *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999), for example, the Fourth Circuit rejected a false certification claim that alleged that the defendant fraudulently failed to disclose conflicts of interest that purportedly arose after it entered into a government contract that required it to certify the absence of conflicts. *Id.* at 793. The court concluded that the conflict certification was merely a threshold requirement for demonstrating contracting eligibility and that such certifications were not "in any way related to, let alone prerequisites for, receiving continued funding." *Id.*

Similarly, in *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, the Fifth Circuit remanded a false certification case for further proceedings where it was "unable to determine from the record" whether the federal government's reimbursement of Medicare services was "conditioned on defendants' certifications of compliance" with health-care laws, which were submitted as part of the annual cost reports that the defendants filed with the federal government. 125 F.3d at 902, 903. The defendants argued that they could not be held liable under the false certification theory because the certification was a condition of establishing continuing eligibility to participate in the Medicare program, rather than a condition of receiving payments. Agreeing with the defendants that a false certification claim could not be premised on a condition of program eligibility, the Fifth Circuit directed the district court to determine on remand whether the requirement in question was indeed a con-

dition of eligibility or whether it was a condition of payment adequate to sustain a false certification claim. *Id.* at 903.[1]

Moreover, in a case factually and legally indistinguishable from the decision below, the Fifth Circuit relied upon the distinction between conditions of eligibility and conditions of payment to dismiss an FCA claim premised on an educational institution's alleged failure to comply with the same restriction on incentive compensation at issue here. In *United States ex rel. Graves v. ITT Educational Services, Inc.*, 284 F. Supp. 2d 487 (S.D. Tex. 2003), *aff'd*, 111 F. App'x 296 (5th Cir. 2004), the district court explained that there is "a distinction between generally certifying compliance with applicable regulations and statutes governing *participation* in a program"—which it deemed insufficient to support a false certification claim—and "certifying compliance with a particular requirement that is a prerequisite to receiving or retaining *payment* under that program"—which the court deemed an appropriate basis for proceeding under the false certification theory. *Id.* at 501 (emphases added). Because Title IV of the HEA "do[es] not expressly condition payment or retention of the student loans . . . on the submission of certification of compliance with" the restriction on incentive compensation, the district court concluded that the restriction is merely "a condition of eligibility to participate in the program, not an express condition of payment of specific claims," and that the restriction thus could not support

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[1] On remand, the district court described its task as "determin[ing] whether the government's payments for the services identified in those annual cost reports were conditioned on the truthfulness of [the] certifications" included in those reports. *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1020 (S.D. Tex. 1998). The district court concluded that the relator had stated a valid false certification claim because he "provided evidence . . . that [the federal government] relied on the certifications in determining the issues of *payment* and *retention of payment* as well as continued eligibility for participation in the Medicare program." *Id.* at 1046 (emphases added).

the relators' false certification cause of action. *Id.* at 502. The Fifth Circuit affirmed the dismissal "essentially for the reasons stated in" the district court's opinion. *United States ex rel. Graves v. ITT Educ. Servs., Inc.*, 111 F. App'x 296, 297 (5th Cir. 2004), *cert. denied*, 544 U.S. 978 (2005); *see also United States ex rel. Gay v. Lincoln Technical Inst., Inc.*, 111 F. App'x 286 (5th Cir. 2004) (affirming the dismissal of a false certification claim that alleged violations of the restriction on incentive compensation, where the district court had concluded that the defendant did not make a false certification of compliance on which payment was conditioned), *aff'g* 2003 U.S. Dist. LEXIS 25968 (N.D. Tex. Sept. 3, 2003). *Graves* therefore bars a litigant in the Fifth Circuit from bringing an FCA claim that, under the decision below, would be viable in the Ninth Circuit.

The Second Circuit has also recognized the legal significance of the distinction between conditions of payment and threshold eligibility conditions. In *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001), the court dismissed an FCA claim that was premised upon the defendants' certification of compliance with a condition of eligibility to participate in the Medicare program, while recognizing that the relator could have pled a valid FCA claim based upon a certification of compliance with a requirement that was a condition of receiving Medicare payments. *Id.* at 702. The court explained that "[s]ince the [FCA] is restitutionary and aimed at retrieving ill-begotten funds, it would be anomalous to find liability when the alleged noncompliance would not have influenced the government's decision to pay" and that the false certification theory can therefore be applied only "where a party certifies compliance with a statute or regulation as a condition to governmental payment." *Id.* at 697. The court concluded that a false certification claim could be predicated upon a Medicare form that required the claimant to certify that "the services shown . . . were medically indicated and necessary" and that provided that "[n]o . . . Medicare benefits *may be*

paid unless this form is received," because, the court explained, "compliance [with the terms on the form] was a precondition of governmental payment." *Id.* at 698 (emphasis added; internal quotation marks omitted).

The relators in *Mikes* also sought to premise a false certification claim upon the defendants' alleged violation of a regulation establishing standards of care for Medicare providers. The Second Circuit dismissed that claim, however, because the standard-of-care provision did not "explicitly condition payment upon compliance," but rather set forth eligibility requirements for Medicare participation. 274 F.3d at 701. The court reasoned that the "False Claims Act was not designed for use as a blunt instrument to enforce compliance with all medical regulations—but rather only those regulations that are a precondition to payment." *Id.* at 699.

2. This Court's review is warranted to resolve the circuits' pervasive disagreement on the question whether an FCA false certification claim can be premised upon a violation of a threshold condition of program eligibility or must instead be predicated on a condition of payment. In the absence of this Court's authoritative construction of the FCA, the tens of thousands of businesses that regularly contract with the federal government—including those in the education, health-care, and defense industries—will be confronted with substantial uncertainty regarding the parameters of the FCA and the extent of the liability risk to which they may be exposed under its provisions.

Moreover, the Ninth Circuit's holding that a false certification claim can be premised on alleged noncompliance with a threshold condition of program eligibility is deeply flawed as a legal matter—a fact that compounds the urgent need for this Court's review. This Court has long recognized (*McNinch*, 356 U.S. at 599), and the Second Circuit has recently reiterated, that "not all instances of regulatory noncompliance will cause a claim to become false" for purposes

of the FCA. *Mikes*, 274 F.3d at 697. The FCA's scope is circumscribed by its statutory language, which proscribes the use of a "false . . . statement to get a false or fraudulent claim *paid* or *approved* by the Government," 31 U.S.C. § 3729(a)(2) (emphases added), not the use of a false statement to obtain eligibility to participate in a government benefit program. Although false statements at the eligibility stage may be prohibited by federal law, *see, e.g.*, 18 U.S.C. § 1001, they do not fall within the ambit of the FCA's plain language and its peculiar enforcement mechanisms. Indeed, contrary to the Ninth Circuit's concern that recognizing the distinction between conditions of eligibility and conditions of payment would afford government contractors free rein to "flout" the law, Pet. App. 16a, the FCA is supplemented by numerous specific provisions that provide a remedy for fraudulent conduct by government contractors, including in the Title IV context. *See, e.g.*, 20 U.S.C. § 1094(c)(3)(B)(i) (providing for a civil penalty of up to $27,500 for each violation of a Title IV requirement); 41 C.F.R. § 105-68.800(b)(3) (providing for the debarment from future contracting opportunities of a federal contractor that is in "willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction"). Significantly, these remedies, unlike the FCA, are subject to the federal government's direct and exclusive control.

The Ninth Circuit's refusal to distinguish between conditions of eligibility and conditions of payment for purposes of FCA liability will compel educational institutions to defend themselves against potentially devastating FCA liability based upon noncompliance with any of the extensive regulations that govern participation in the federal financial aid program. Indeed, the PPA to which institutions must agree in order to establish eligibility to participate in the Title IV program sets forth pages of detailed regulatory requirements, ranging from the operation of a drug-abuse prevention program to limitations on the use of job-placement statistics.

Pet. App. 27a-46a. Hundreds of additional requirements are found in the pages of the Code of Federal Regulations. 34 C.F.R. pt. 668; *see, e.g.*, *id.* § 668.24 (establishing record retention requirements for participating institutions, including the number of years that financial aid paperwork must be retained); *id.* § 668.25 (imposing restrictions on an institution's contracts with third parties to administer the Title IV program); *id.* § 668.45(a)(5) (requiring an institution to publish its graduation statistics annually by July 1).

The financial implications of the Ninth Circuit's expansive notion of FCA liability are staggering. Relators contend that, because UOP is purportedly ineligible to participate in the Title IV financial aid program due to its alleged violation of the restriction on incentive compensation, each financial aid application submitted by the school or its students constitutes a separate false claim. If relators prevail, UOP may potentially be liable for a civil penalty of between $5,500 and $11,000 for each of the hundreds of thousands of financial aid applications submitted on behalf of UOP students in the years preceding the initiation of relators' suit—the civil penalty alone could total well more than a *billion* dollars. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9).[2] This amount would be augmented by a treble damages assessment, which relators allege the district court should calculate based upon the billions of dollars in financial aid payments that UOP received in the years preceding this suit. UOP faces this risk of overwhelming liability even though it is undisputed that each

[2] Unlike the civil penalty provision of the HEA, which provides for a $27,500 penalty per statutory or regulatory *violation*, 20 U.S.C. § 1094(c)(3)(B)(i); 34 C.F.R. § 668.84, the FCA provides for a fine of between $5,500 and $11,000 for each false or fraudulent *claim* submitted to the federal government. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9). Under the Ninth Circuit's reasoning, a single statutory or regulatory violation—subject to a $27,500 fine under the HEA—arguably could give rise to thousands of false or fraudulent claims and a multimillion-dollar penalty under the FCA.

financial aid application it submitted to the federal government was completely accurate and truthful.

Confronted with this alarming prospect, UOP and other FCA defendants with viable factual defenses against the alleged statutory or regulatory violations of which they stand accused will nevertheless be under tremendous pressure to settle. The Ninth Circuit's broad reading of the FCA thus effectively transforms the FCA from a means of remedying fraud against the federal government into a mechanism for extorting settlements from defendants unable to sustain the severe risks of going to trial. The inevitable result will be a proliferation of meritless but financially successful suits, simultaneously causing higher tuition rates for students, denying funds for classroom resources and student services, and producing undeserved financial windfalls for relators—and their counsel. Indeed, the Ninth Circuit's decision has profound ramifications not only for proprietary institutions like UOP, but also for traditional, not-for-profit higher education institutions. *See United States v. Chapman Univ.*, 2006 WL 1562231, at *3 (C.D. Cal. May 23, 2006) (denying a motion to dismiss an FCA claim that alleged that a traditional, not-for-profit university had falsely certified its eligibility to participate in the federal financial aid program by knowingly failing to provide the number of classroom hours mandated by a private accrediting association). And, outside of the education context, the notion that FCA false certification claims can be premised on threshold eligibility conditions has equally far-reaching consequences for health-care providers, defense contractors, and other industries that frequently conduct business with the federal government pursuant to highly detailed regulatory and contractual regimes.

The significant financial repercussions of the Ninth Circuit's expansive (and patently erroneous) interpretation of the FCA—together with the circuit split exacerbated by the Ninth Circuit's decision—make this case eminently worthy of this Court's consideration.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THE SECOND AND THIRD CIRCUITS HOLDING THAT A FALSE REPRESENTATION IS A PREREQUISITE TO A FALSE CERTIFICATION CLAIM.

The extensive disagreement among the circuits regarding the viability of an FCA false certification claim premised on a violation of a condition of program eligibility is a sufficient reason, in and of itself, for this Court to grant certiorari. The pressing need for this Court's review is reinforced by the fact that the Ninth Circuit's reading of the FCA conflicts with other circuits' decisions in several other significant respects. For example, the circuits are sharply divided over whether a false representation of compliance is necessary to state a false certification claim or whether a knowing course of conduct that violates a statutory, regulatory, or contractual condition is sufficient. This case provides the Court with the opportunity to resolve this additional area of uncertainty surrounding the FCA.

1. The Second and Third Circuits have both held that an explicit representation of compliance with a statutory or regulatory requirement on which payment is conditioned is an essential element of a false certification claim under the FCA. As the Second Circuit explained in *Mikes v. Straus*, "the 'certification theory' of liability . . . is predicated upon a false *representation* of compliance with a federal statute or regulation" on which payment of a claim is conditioned. 274 F.3d at 696 (emphasis added). The court concluded that the representation requirement was satisfied by a Medicare reimbursement form that required the claimant to certify that the services for which reimbursement was being sought were "medically indicated and necessary." *Id.* at 698.

In *United States ex rel. Quinn v. OmniCare Inc.*, 382 F.3d 432 (3d Cir. 2004), the Third Circuit similarly emphasized that the "'certification theory' of FCA liability is based

on a false representation of compliance with a contract term, statute, or regulation." *Id.* at 441. The court determined that this requirement was met by a reimbursement form that required a claimant to certify that the services in question were rendered "in accordance with . . . [Medicaid] regulations." *Id.* (alterations in original; internal quotation marks omitted); *see also United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 679 (5th Cir. 2003) (en banc) (Jones, J., concurring) ("a false certification must be a 'false *statement*' made 'to get' a false claim paid") (emphasis added).

In direct conflict with the requirements for stating a false certification claim in the Second and Third Circuits—but in accord with a decision from the Fourth Circuit—the Ninth Circuit held below that a "fraudulent course of conduct" is sufficient to state a false certification claim. Pet. App. 13a; *see also Harrison*, 176 F.3d at 788 ("The test for False Claims Act liability . . . is . . . whether there was a false statement or fraudulent course of conduct . . . that caused the government to pay out money"). The Ninth Circuit concluded that relators had therefore pled a viable FCA claim under the false certification theory because they alleged that UOP knowingly violated the restriction on incentive compensation by paying its admissions counselors enrollment-based compensation. Pet. App. 14a. This holding is directly at odds with the Second and Third Circuits' conclusion that a "false representation" of statutory or regulatory compliance—rather than a mere course of conduct—is a necessary element of a false certification claim.

2. This Court should grant certiorari to address this additional area of lower-court disagreement regarding the FCA and to reject the far-reaching and erroneous conclusion that an alleged fraudulent course of conduct suffices to state a false certification claim. Under the Ninth Circuit's broad reading of the FCA, *any* knowing violation of the extensive regulatory provisions that govern participation in a federal benefit program is adequate to state an FCA claim, entitles a

relator to discovery, and can culminate in FCA liability. Indeed, there are 162 pages of regulations that govern participation in the Title IV HEA program (34 C.F.R. pt. 668)—in the Ninth Circuit, a knowing violation of any of these provisions is sufficient to state a claim under the FCA.

As with the Ninth Circuit's conclusion that a false certification claim can be premised on a condition of program eligibility, this holding represents a radical extension of the FCA's scope that—contrary to Congress's intentions and this Court's teachings—transforms the statute into a remedy for virtually all fraudulent conduct against the federal government and displaces other remedial measures designed to encompass such fraudulent activities. Indeed, as the Ninth Circuit itself recognized in a case that it overruled *sub silentio* in the decision below, "There are administrative and other remedies for regulatory violations. . . . However, absent actionable false certifications upon which funding is conditioned, the False Claims Act does not provide such a remedy." *Hopper*, 91 F.3d at 1267. The statutes and regulations governing the Title IV program provide a number of remedial mechanisms for addressing fraudulent violations of the restriction on incentive compensation. *See, e.g.*, 20 U.S.C. § 1094(c)(3)(B)(i). Reliance upon the "blunt instrument" of the FCA to remedy fraudulent conduct in connection with the Title IV program is not only wholly unnecessary (*Mikes*, 274 F.3d at 699), but also potentially disruptive of the carefully calibrated remedial regime established by Congress and the Department of Education.

Moreover, if left undisturbed, the decision below could be read as eviscerating the distinction between the widely accepted express false certification theory and the often-criticized implied false certification theory—an expansive approach to FCA liability, adopted by several circuits, that is premised on the notion that a claimant impliedly certifies its eligibility to receive payment whenever it submits a claim for payment to the government. *Compare Shaw v. AAA Eng'g &*

Drafting, Inc., 213 F.3d 519, 532 (10th Cir. 2000) (recognizing an FCA cause of action based on "implied" certification of statutory or regulatory compliance), *with Harrison*, 176 F.3d at 786 n.8 (labeling the implied certification theory "questionable"). Although the Ninth Circuit purported not to resolve the viability of the implied false certification theory (Pet. App. 9a n.1), its rejection of the false representation requirement effectively nullified the distinction between the express and implied theories of false certification. If a false representation is no longer an element of an express false certification claim, and a "course of conduct" can constitute the requisite certification, then any distinction between the express and implied theories of liability is meaningless.

III. The Decision Below Conflicts With Decisions From The Fifth And D.C. Circuits Imposing A Strict Pleading Threshold On Promissory Fraud Claims.

The Ninth Circuit's decision also dramatically lowers the threshold for pleading a promissory fraud claim under the FCA, in direct conflict with the stringent pleading requirements endorsed by at least two other circuits.

Promissory fraud may be actionable under the FCA where a claimant uses fraud to obtain eligibility to participate in a government benefit program. Although the origins of this theory of liability are generally traced to this Court's decision in *United States ex rel. Marcus v. Hess*—which held that a defendant's use of an illegal bid-rigging scheme to obtain a government contract rendered its ensuing claims for payment fraudulent for purposes of the FCA (317 U.S. at 543)—the lower federal courts have expanded the contours of the promissory fraud theory beyond the fact pattern in that case, where the bid-rigging scheme was the proximate cause of the claimant's eligibility to receive payment from the government, to cases in which the connection between the initial act of fraud and the claim for payment is significantly more

attenuated. The Seventh Circuit has held, for example, that whenever a defendant secures the right to participate in a federal benefit program by promising to comply with the program's eligibility requirements, without actually intending to comply with those requirements and in fact failing to do so, then the defendant may be liable for promissory fraud under the FCA. *See Main*, 426 F.3d at 916 (holding that a relator had stated a promissory fraud claim by alleging that an educational institution lied about its intention to comply with the restriction on incentive compensation).

This Court, of course, has never sanctioned such a boundless definition of promissory fraud, and a number of courts have attempted to cabin the theory's reach by imposing exacting pleading requirements on relators asserting such claims. In the Fifth and D.C. Circuits, a naked allegation that the defendant violated a program's regulatory requirements is insufficient to support an inference that the defendant lied about its intention to comply with those requirements and thus to state a claim under the promissory fraud theory. As the D.C. Circuit has explained, "there is no inference of fraudulent intent not to perform from the mere fact that a promise made is subsequently not performed." *United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1329-30 (D.C. Cir. 2005) (internal quotation marks omitted); *see also United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 386 (5th Cir. 2003) (same). To survive a motion to dismiss a promissory fraud claim in the Fifth and D.C. Circuits the relator must instead allege "that the defendant *promptly* followed through on its intent not to perform by *substantially* failing to carry out its obligations under the contract." *Willard*, 336 F.3d at 386 (emphases added); *see also Bettis*, 393 F.3d at 1330 (affirming a grant of summary judgment in favor of the defendant on a promissory fraud claim because there was no evidence that the defendant had repudiated the contract quickly after entering into it).

In conflict with the pleading requirements recognized in the Fifth and D.C. Circuits, the Ninth Circuit below relied exclusively upon relators' allegation of UOP's noncompliance with the restriction on incentive compensation to support the inference that UOP knowingly lied when it agreed in the PPA to comply with that restriction. Pet. App. 14a. The court did not require relators to allege—as they would have been required to do in the Fifth and D.C. Circuits—facts that, if proven, would have established that immediately after entering into the PPA, UOP substantially failed to comply with the restriction on incentive compensation by paying its admissions counselors incentive compensation based solely on enrollments.

The relaxed standard for pleading promissory fraud endorsed by the Ninth Circuit virtually guarantees that a claim will survive a motion to dismiss and that the defendant will face significant pressure to settle even the most dubious of promissory fraud claims. Coupled with the Ninth Circuit's vast extension of the false certification theory of FCA liability, the Ninth Circuit's unwillingness to police the bounds of the promissory fraud theory essentially transmutes the FCA into a remedy for "every kind of fraud practiced on the Government" (*McNinch*, 356 U.S. at 599)—in direct conflict with the contrary holdings of this Court and other circuits. This Court's review is warranted to resolve these conflicts and to ensure that government contractors are not saddled with the prospect of potentially bankrupting FCA liability based on alleged conduct that Congress intended to regulate under more nuanced—and less punitive—statutory and regulatory regimes.

CONCLUSION

In light of the circuits' profound disagreement regarding the scope of the FCA, and the significant impact of the FCA on everyone who contracts with the federal government, there is an urgent need for this Court to grant review and

clarify the statute's parameters. Without this Court's intervention, a litigant could bring an FCA false certification claim premised on the violation of any program eligibility requirement in the Seventh and Ninth Circuits, but would be barred from doing so in the Second, Fourth, and Fifth Circuits, where such claims are limited to requirements on which government payment is conditioned. Similarly, in the Fourth and Ninth Circuits, a litigant could base a false certification claim on any knowing "course of conduct" that violates a regulatory requirement, but would be restricted to false representations of regulatory compliance in the Second and Third Circuits. The decision below exacerbates this unacceptable conflict, and, if left uncorrected, will risk exposing government contractors to potentially bankrupting liability on the basis of obscure regulatory violations that Congress never intended to fall within the peculiar enforcement mechanism of the FCA.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 22, 2007

APPENDIX

APPENDIX A

UNITED STATES of America, ex rel. Mary HENDOW; Julie Albertson, Plaintiffs–Appellants,

v.

UNIVERSITY OF PHOENIX, Defendant–Appellee.

No. 04-16247.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Feb. 15, 2006.

Filed Sept. 5, 2006.

Nancy G. Krop, Law Offices of Nancy G. Krop, Redwood City, CA and Daniel Robert Bartley, Law Offices of Daniel Robert Bartley, Counsel for the plaintiffs-appellants.

Timothy J. Hatch, Gibson, Dunn & Crutcher LLP, Los Angeles, CA, for the defendant-appellee.

Charles W. Scarborough, Department of Justice, Civil Division, Washington, DC, for the amicus.

Appeal from the United States District Court for the Eastern District of California; Garland E. Burrell, District Judge, Presiding. D.C. No. CV-03-00457-GEB.

Before: HALL, SILVERMAN, and GRABER, Circuit Judges.

HALL, Senior Circuit Judge:

The False Claims Act makes liable anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2). In this case, relators have raised allegations that the University of Phoenix knowingly made false statements, and caused false statements to be made, that resulted in the payment by the federal Department of Education of hundreds of millions of dollars. Despite this axiomatic fit between the operative statute and the allegations made, respondent claims that relators' legal theory holds no water. The district court agreed, dismissing the suit for failure to state a claim upon which relief can be granted. We reverse.

I.

When an educational institution wishes to receive federal subsidies under Title IV and the Higher Education Act, it must enter into a Program Participation Agreement with the Department of Education (DOE), in which it agrees to abide by a panoply of statutory, regulatory, and contractual requirements. One of these requirements is a ban on incentive compensation: a ban on the institution's paying recruiters on a per-student basis. The ban prohibits schools from "provid[ing] any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance." 20 U.S.C. § 1094(a)(20). This requirement is meant to curb the risk that recruiters will "sign up poorly qualified students who will derive little benefit from the subsidy and may be unable or unwilling to repay federally guaranteed loans." *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005), *cert. denied*, — U.S. —, 126 S.Ct. 1786, 164 L.Ed.2d 519 (2006). The ban was enacted based on evidence of serious program abuses. *See* S.Rep. No. 102-58, at 8 (1991) ("Abuses in Federal Student

Aid Programs") (noting testimony "that contests were held whereby sales representatives earned incentive awards for enrolling the highest number of student[s] for a given period"); H.R.Rep. No. 102-447, at 10, *reprinted in* 1992 U.S.C.C.A.N. 334, 343 (noting that the "new provisions include prohibiting the use of commissioned sales persons and recruiters").

This case involves allegations under the False Claims Act that the University of Phoenix (the University) knowingly made false promises to comply with the incentive compensation ban in order to become eligible to receive Title IV funds. Appellants, Mary Hendow and Julie Albertson (relators), two former enrollment counselors at the University, allege that the University falsely certifies each year that it is in compliance with the incentive compensation ban while intentionally and knowingly violating that requirement. Relators allege that these false representations, coupled with later claims for payment of Title IV funds, constitute false claims under 31 U.S.C. § 3729(a)(1) & (a)(2).

First, relators allege that the University, with full knowledge, flagrantly violates the incentive compensation ban. They claim that the University "compensates enrollment counselors . . . based directly upon enrollment activities," ranking counselors according to their number of enrollments and giving the highest-ranking counselors not only higher salaries but also benefits, incentives, and gifts. Relators allege that the University also "urges enrollment counselors to enroll students without reviewing their transcripts to determine their academic qualifications to attend the university," thus encouraging counselors to enroll students based on numbers alone. Relator Albertson, in particular, alleges that she was given a specific target number of students to recruit, and that upon reaching that benchmark her salary increased by more than $50,000. Relator Hendow specifically alleges that she won trips and home electronics as a result of enrolling large numbers of students.

Second, relators allege considerable fraud on the part of the University to mask its violation of the incentive compensation ban. They claim that the University's head of enrollment openly brags that "[i]t's all about the numbers. It will always be about the numbers. But we need to show the Department of Education what they want to see." To deceive the DOE, relators allege, the University creates two separate employment files for its enrollment counselors—one "real" file containing performance reviews based on improper quantitative factors, and one "fake" file containing performance reviews based on legitimate qualitative factors. The fake file is what the DOE allegedly sees. Relators further allege a series of University policy changes deliberately designed to obscure the fact that enrollment counselors are compensated on a per-student basis, such as altering pay scales to make it less obvious that they are adjusted based on the number of students enrolled.

Third and finally, relators allege that the University submits false claims to the government. Claims for payment of Title IV funds can be made in a number of ways, once a school signs its Program Participation Agreement and thus becomes eligible. For instance, in the Pell Grant context, students submit funding requests directly (or with school assistance) to the DOE. In contrast, under the Federal Family Education Loan Program, which includes Stafford Loans, students and schools jointly submit an application to a private lender on behalf of the student, and a guaranty agency makes the eventual claim for payment to the United States only in the event of default. Relators allege that the University submits false claims in both of these ways. They claim that the University, with full knowledge that it is ineligible for Pell Grant funds because of its violation of the incentive compensation ban, submits requests for those funds directly to the DOE, resulting in a direct transfer of the funds into a University account. They further claim that the University, again with knowledge that it has intentionally violated the incentive

compensation ban, submits requests to private lenders for government-insured loans.

On May 20, 2004, the district court dismissed the relators' complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Relators appealed on June 15, 2004. The United States Department of Justice submitted a brief as amicus curiae supporting the reversal of the district court. Because this case comes to us on a motion to dismiss, we assume that the facts as alleged are true, and examine only whether relators' allegations support a cause of action under the False Claims Act under either of two possible theories. *See Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001) ("We review dismissals under Rule 12(b)(6) *de novo*, accepting as true all well-pleaded allegations of fact in the complaint and construing them in the light most favorable to the plaintiffs."). We hold that they do, and that either theory is viable.

II.

The district court below rejected both of relators' theories for why they have validly alleged that the University submitted false or fraudulent claims to the government in violation of the False Claims Act. First, the court rejected relators' claim under the "false certification" theory, as treated by this court in *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996), because the operative statute here "only requires that [the University] enter into an agreement, and does not require a certification." Second, the district court rejected relators' claim under the "promissory fraud" theory, because they did not "identif[y] any certification which is a prerequisite for [the University] to receive federal funds." These rulings conflated the proper analysis of False Claims Act liability, and so we will discuss the relevant theories in more detail.

In an archetypal *qui tam* False Claims action, such as where a private company overcharges under a government

contract, the claim for payment is itself literally false or fraudulent. *See Anton*, 91 F.3d at 1266. The False Claims Act, however, is not limited to such facially false or fraudulent claims for payment. *See id.* Rather, the False Claims Act is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968). More specifically, in amending the False Claims Act in 1986, Congress emphasized that the scope of false or fraudulent claims should be broadly construed:

> [E]ach and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim.

S.Rep. No. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274.

The principles embodied in this broad construction of a "false or fraudulent claim" have given rise to two doctrines that attach potential False Claims Act liability to claims for payment that are not explicitly and/or independently false: (1) false certification (either express or implied); and (2) promissory fraud. *See Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999).

A. False Certification

Many different courts have held that a claim under the False Claims Act can be false where a party merely falsely certifies compliance with a statute or regulation as a condition to government payment. *See, e.g., id.* at 786; *Mikes v. Straus*, 274 F.3d 687, 697-700 (2d Cir. 2001); *United States ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432, 441 (3d Cir. 2004). The leading case on false certification in the Ninth Circuit is *United States ex rel. Hopper v. Anton.*

In *Anton*, a relator-plaintiff brought a False Claims Act suit against the Los Angeles Unified School District (LAUSD) for allegedly submitting false claims for federal funds while in knowing violation of an underlying statute granting funds for special education programs (the Individuals with Disabilities Education Act, "IDEA"). 91 F.3d at 1263. In particular, the relator alleged that LAUSD's method of evaluating potential student eligibility for the program violated the IDEA. *Id.* LAUSD allegedly (1) submitted forms stating the number of eligible students in the district; (2) cashed checks that were partially comprised of federal funds; and (3) submitted triennial certifications averring that LAUSD "'will meet all applicable requirements of state and federal law and regulations,' including 'general compliance' with the IDEA." *Id.* at 1265. We held that False Claims Act liability can attach under the theory of false certification, although the relators had not presented sufficient evidence of fraud. *Id.*

In *Anton*, we explained the theory of false certification, identifying two major considerations: "'(1) whether the false statement is the cause of the Government's providing the benefit; and (2) whether any relation exists between the subject matter of the false statement and the event triggering Government's [sic] loss.'" *Id.* at 1266 (quoting John T. Boese, *Civil False Claims and Qui Tam Actions* 1-29 to 1-30 (1995)). We also held that "[m]ere regulatory violations do not give rise to a viable FCA action," but rather, "[i]t is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit." *Id.* at 1266-67 (emphasis in original). From the principles underlying these two statements, we created four conditions necessary to succeed on the false certification theory of False Claims Act liability.

First, we emphasized the necessity of a *false* claim, rather than a mere unintentional violation. We did not hold in *Anton* that regulatory violations will go unchecked by the

False Claims Act, but we did agree with the lower court's reasoning that for a "breach of contract, or violation of regulations or law, or receipt of money from the government" to give rise to an action under the False Claims Act, "[i]t requires a false claim." 91 F.3d at 1265. We went on to note that the "fatal defect" in *Anton* was not that the claimed infraction was a regulatory violation, but that there was a "lack of a false claim." *Id.* at 1267. Thus, we established that to succeed on a false certification theory, some falsity must be alleged.

Second, we emphasized the central importance of the scienter element to liability under the False Claims Act, holding that false claims must in fact be "false when made." *Id.* (citing *United States v. Shah*, 44 F.3d 285, 290 (5th Cir. 1995)). In fact, we held, "[f]or a certified statement to be 'false' under the Act, it must be an intentional, palpable lie." *Id.* (citing *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996)). We also noted that "some request for payment containing falsities made with scienter (*i.e.*, with knowledge of the falsity and with intent to deceive) must exist." *Id.* at 1265. In short, we made clear that a palpably false statement, known to be a lie when it is made, is required for a party to be found liable under the False Claims Act.

We note that the University and the district court below have taken our holdings to mean that the word "certification" has some paramount and talismanic significance, apparently believing that a palpably false *statement* does not bring with it False Claims liability, while a palpably false *certification* will. This facile distinction would make it all too easy for claimants to evade the law. The Fourth Circuit rightly noted that False Claims liability attaches "*because of the fraud* surrounding the efforts to obtain the contract or benefit status, or the payments thereunder." *Harrison*, 176 F.3d at 788 (emphasis added). That the theory of liability is commonly called "false certification" is no indication that "certification"

is being used with technical precision, or as a term of art; the theory could just as easily be called the "false statement of compliance with a government regulation that is a precursor to government funding" theory, but that is not as succinct. Furthermore, because the word "certification" does not appear in 31 U.S.C. § 3729(a)(1) or (a)(2), there is no sense in parsing it with the close attention typically attending an exercise in statutory interpretation. So long as the statement in question is knowingly false when made, it matters not whether it is a certification, assertion, statement, or secret handshake; False Claims liability can attach.

Third, we held that the false statement or course of conduct must be material to the government's decision to pay out moneys to the claimant. This is plain from our focus on "(1) whether the false statement is the cause of the Government's providing the benefit; and (2) whether any relation exists between the subject matter of the false statement and the event triggering Government's [sic] loss." *Anton*, 91 F.3d at 1266. We also stated that the relevant certification of compliance must be both a "prerequisite to obtaining a government benefit," *id.*, and a "*sine qua non* of receipt of [government] funding," *id.* at 1267. We further held that the government funding must be "conditioned" upon certifications of compliance. *Id.*

This approach has been followed by a number of other circuits to adopt the false certification theory of false claims liability.[1] *See Mikes*, 274 F.3d at 699 (holding that false cer-

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[1] Some courts, such as the Court of Federal Claims, have adopted a version of the false certification theory whereby the certification need only be implied, rather than express. In those cases, if a party submits a claim for payment under a government program with requirements for participation, that claim is taken as an implied certification that the party was in compliance with those program requirements. *See Ab–Tech Constr., Inc. v. United States*, 31 Fed.Cl. 429, 434 (Fed. Cl. 1994).

tification theory applies when "governing federal rules . . . are a precondition to payment"); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997) (holding that false claims liability attaches only "where the government has conditioned payment of a claim upon a claimant's certification of compliance with . . . a statute or regulation"); *Ab-Tech Constr., Inc. v. United States*, 31 Fed.C1. 429, 434 (Fed. C1. 1994) (holding that false statement of compliance must be "critical to the decision to pay"), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995). Once again, we note that there is no special significance to the term "certification" in determining materiality; the question is merely whether the false certification—or assertion, or statement—was relevant to the government's decision to confer a benefit.

Fourth and most obviously, for a false statement or course of action to be actionable under the false certification theory of false claims liability, it is necessary that it involve an actual *claim*, which is to say, a call on the government fisc. This is self-evident from the statutory language, of course, which requires a "claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2). In *Anton*, the case involved direct receipt of federal funding, but we agree with the Fourth Circuit that a claim arises whenever the government is asked to "pay out money or to forfeit moneys due." *Harrison*, 176 F.3d at 788.

[Footnote continued from previous page]

Here, we need not address the viability of this theory, because it is beyond dispute that the University signed the written Program Participation Agreement, thus making an express statement of compliance.

B. Promissory Fraud

Another approach to finding False Claims Act liability in the absence of an explicitly false claim is the "promissory fraud" or "fraud-in-the-inducement" theory. This theory, rather than specifically requiring a false statement of compliance with government regulations, is somewhat broader. It holds that liability will attach to each claim submitted to the government under a contract, when the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct. *See, e.g., id.*, 176 F.3d at 787; *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542, 63 S.Ct. 379, 87 L.Ed. 443 (1943). In *Hess*, the Supreme Court found contractors liable under the False Claims Act for claims submitted under government contracts that the defendants obtained via collusive bidding. *Id.* The Court determined that "[t]his fraud did not spend itself with the execution of the contract," and so each claim submitted under the contracts constituted a false or fraudulent claim. *Id.* at 543, 63 S.Ct. 379. In other words, subsequent claims are false because of an *original fraud* (whether a certification or otherwise).

The Seventh Circuit recently adopted a version of the promissory fraud theory in a case almost identical to this one, *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005), *cert. denied*, — U.S. —, 126 S.Ct. 1786, 164 L.Ed.2d 519 (2006). Relators in *Main* alleged liability under the False Claims Act based on an Oakland City University representation that it would comply with the incentive compensation ban, despite its knowledge of the ban and intent not to comply. *See id.* at 916. As here, the district court dismissed the case for failure to state a claim, ruling that even willful falsehoods in a "phase-one application" do not violate the False Claims Act, because such an application requests a declaration of eligibility rather than an immediate payment from the treasury. *See id.* The district court further ruled that the "phase two" applications for funds are not false, because

they do not repeat the assurance that the University abides by the rule against paying contingent fees to recruiters. *See id.*

The Seventh Circuit reversed, analyzing the claim under a promissory fraud theory, and holding that the relators had stated a claim based upon allegations of fraud in the inducement of the original Program Participation Agreement. *See id.* The court did not address the false certification theory directly, although it implicitly recognized that the district court had rejected relator's arguments on that ground. Pursuant to the plain language of 31 U.S.C. § 3729(a)(2), the court determined that False Claims Act liability was clear: "[t]he University 'uses' its phase-one application (and the resulting certification of eligibility) when it makes (or 'causes' a student to make or use) a phase-two application for payment. No more is required under the statute." *Id.*

We find the Seventh Circuit's reasoning in adopting the promissory fraud theory persuasive. We also note that the promissory fraud theory, in substance, is not so different from the false certification theory, and even requires the same elements. For instance: first, a claim must be false and, second, that falsity must be knowingly perpetrated. The Seventh Circuit opined eloquently on this point:

> To prevail in this suit [relator] must establish that the University not only knew . . . that contingent fees to recruiters are forbidden, but also planned to continue paying those fees while keeping the Department of Education in the dark. This distinction is commonplace in private law: failure to honor one's promise is (just) breach of contract, but making a promise that one *intends* not to keep is fraud . . . . [I]f the University knew about the rule and told the Department that it would comply, while planning to do otherwise, it is exposed to penalties under the False Claims Act.

Id. at 917 (emphasis in original) (citations omitted). We, too, have held that for promissory fraud to be actionable under the False Claims Act, "the promise must be false when made." *Anton*, 91 F.3d at 1267. We have also noted that "[i]nnocent mistakes, mere negligent misrepresentations and differences in interpretations" are not sufficient for False Claims Act liability to attach. *Id.* In short, therefore, under a promissory fraud theory, relator must allege a false or fraudulent course of conduct, made with scienter.

Third, as with the false certification theory, the promissory fraud theory requires that the underlying fraud be material to the government's decision to pay out moneys to the claimant. The Seventh Circuit in *Main* stated that the False Claims Act requires "a causal rather than a temporal connection between fraud and payment," 426 F.3d at 916, and we agree. And fourth and finally, there must exist a *claim*—a call on the government fisc. As the Seventh Circuit rightly noted, the precise logistical details of how the claim is made—with respect to timing, for instance, or the number of stages involved—are immaterial: "[i]f a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork." *Id.* In other words, for there to exist a "claim" for purposes of False Claims Act liability, it must involve merely some sort of request for the government to pay out money or forfeit moneys due.

III.

Thus, as the above analysis shows, under either the false certification theory or the promissory fraud theory, the essential elements of False Claims Act liability remain the same: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due. The question remaining is whether relators in this case have alleged facts satisfying all four of these elements.

A. Falsity

Relators allege a false statement or course of conduct. They allege that the University violates a statutory requirement, the incentive compensation ban, to which it agreed in writing in the Program Participation Agreement. They allege that the University establishes policies of violating that requirement, and encourages its employees to violate that requirement. They allege specific instances of violation, where higher salaries, benefits, and incentives were given in response to increased enrollment. And they allege that the University did so knowingly, and with the specific intent to deceive the government. Thus, relators properly allege a false statement or course of conduct.

B. Scienter

Relators allege a false statement or course of conduct made knowingly and intentionally. They allege that University staff openly bragged about perpetrating a fraud, that the University had an established infrastructure to deceive the government, and that the University repeatedly changed its policies to hide its fraud. In other words, relators allege that the University provided statements to the government that were "intentional, palpable lie[s]," made with "knowledge of the falsity and with intent to deceive." *Anton*, 91 F.3d at 1265, 1267.

The University argues that the incentive compensation ban is nothing more than one of hundreds of boilerplate requirements with which it promises compliance. This may be true, but fraud is fraud, regardless of how "small." The University is worried that our holding today opens it up to greater liability for innocent regulatory violations, but that is not the case—as we held above, innocent or unintentional violations do not lead to False Claims Act liability. But that is no reason to innoculate institutions of higher education from liability when they *knowingly* violate a regulatory condition, with the intent to deceive, as is alleged here. Relators

properly allege false statements or courses of conduct made with scienter.

C. Materiality

Most of the argument in this case centers on whether and how much the University's alleged fraud was material to the government's decision to disburse federal funds. The parties argue at length over, for instance, the enforcement power of the DOE, and whether its authority to take "emergency action"—to withhold funds or impose sanctions where it has information that statutory requirements are being violated—means that the statutory requirements are causally related to its decision to pay out moneys due.

These questions of enforcement power are largely academic, because the eligibility of the University under Title IV and the Higher Education Act of 1965—and thus, the funding that is associated with such eligibility—is *explicitly* conditioned, in three different ways, on compliance with the incentive compensation ban. First, a federal statute states that in order to be eligible, an institution must

> enter into a program participation agreement with the Secretary [of Education]. The agreement *shall condition* the initial and continuing eligibility of an institution to participate in a program *upon compliance* with the following requirements ... [including the incentive compensation ban.]

20 U.S.C. § 1094(a) (emphasis added). Second, a federal regulation specifies:

> An institution may participate in any Title IV, HEA program ... *only if* the institution enters into a written program participation agreement with the Secretary.... A program participation agreement *conditions* the initial and continued participation of an eligible institution in any Title IV, HEA program *upon compliance*

> with the provisions of this part [such as the incentive compensation ban.]

34 C.F.R. § 668.14(a)(1) (emphasis added). Third and finally, the program participation agreement itself states:

> The execution of this Agreement [which contains a reference to the incentive compensation ban] by the Institution and the Secretary is a *prerequisite* to the Institution's initial or continued participation in any Title IV, HEA program.

(emphasis added). All of the emphasized phrases in the above passages demonstrate that compliance with the incentive compensation ban is a necessary condition of continued eligibility and participation: compliance is a "prerequisite" to funding; funding shall occur "only if" the University complies; funding shall be "condition[ed] . . . upon compliance." These are not ambiguous exhortations of an amorphous duty. The statute, regulation, and agreement here all explicitly condition participation and payment on compliance with, among other things, the precise requirement that relators allege that the University knowingly disregarded.

The University argues that the ban is merely a condition of *participation*, not a condition of *payment*. But in this case, that is a distinction without a difference. In the context of Title IV and the Higher Education Act, if we held that conditions of participation were not conditions of payment, there would be no conditions of payment at all—and thus, an educational institution could flout the law at will.

To see why this is so, one only need look at the University's semantic argument, in which it claims that for a condition of participation, an institution says it "'*will*' comply" with various statutes and regulations, but for a condition of payment, an institution says that it "*has* complied." This grammatical haggling is unmoored in the law, and it is undercut by the Program Participation Agreement itself. In the

section that the University concedes contains conditions of payment—the section entitled "Certifications Required From Institutions"—the University agrees that it "will" or "shall" comply with various regulations no less than six times. Under the University's logic, these future-tense assertions could not be conditions of payment, and yet it concedes that they are. Its concession is correct; these, and all other promises to comply with the Program Participation Agreement, are conditions of payment. These conditions are also "prerequisites," and "the *sine qua non*" of federal funding, for one basic reason: if the University had not agreed to comply with them, it would not have gotten paid.

Furthermore, we take the University's argument to mean that it believes if it had signed an agreement that stated "the University of Phoenix certifies that it has complied with the incentive compensation ban," then it would have signed a condition of payment. But the DOE and the United States Congress, as evidenced by the statutes, regulations, and contracts implementing the Title IV and Higher Education Act requirements for funding, quite plainly care about an institution's ongoing conduct, not only its past compliance. For purposes of federal funding, the University is not permitted to merely have a history of compliance with the applicable regulations; it must also agree to comply in the future. The Program Participation Agreement, constraining its ongoing conduct, is the condition of payment that the federal government requires—a promise that the University shall not break the law, not merely an assertion that it has not broken the law *yet*. If such promises were not conditions of payment, the University would be virtually unfettered in its ability to receive funds from the government while flouting the law. This cannot be what Congress and the DOE intend when they ask institutions to sign Program Participation Agreements.

Nor was such laissez-faire compliance what the Second Circuit had in mind, we think, when it developed the "participation versus payment" distinction in the first place. The

case in which that distinction was first mentioned, *Mikes v. Straus*, is completely distinguishable from the case before us. There, in the Medicare context, the defendant was subject to a statutory requirement that stated:

> "[i]t shall be the obligation" of a practitioner who provides a medical service "for which payment may be made . . . to assure" compliance with [42 U.S.C. § 1320c-5(a)].

274 F.3d. at 701. "Compliance," in that instance, meant maintaining an appropriate standard of care, which was ensured by peer review and extensive monitoring. Dereliction of that duty would result in sanctions only where "a violation was especially gross and flagrant." *Id.* at 702. Defendants were accused of not maintaining the appropriate standard of care, but the Second Circuit held that such a violation could not constitute a breach of a condition of payment under the Medicare statute. This makes sense for two interrelated reasons. First, the statutory duty was not to promise *compliance*, but to promise *assurance* of compliance. The fact that defendants did not meet the appropriate standard of care does not necessarily mean that they were ignoring their duty to try their best to comply; rather, it may have indicated merely that they were not doing a very good job. If the allegation had been that the defendants in *Mikes* were not even trying to comply—that they were not only failing to provide the appropriate standard of care, but also affirmatively and knowingly choosing not to—we imagine the *Mikes* case would have come out differently.

And even if it would not have, the *Mikes* court was dealing with the Medicare context, to which the court specifically confined its reasoning. *Id.* at 700. It imposed an additional requirement on Medicare cases: that the underlying statute "expressly" condition payment on compliance. An explicit statement, however, is not necessary to make a statutory re-

quirement a condition of payment, and we have never held as much.

Therefore, because relators have alleged that the University fraudulently violated a regulation upon which payment is expressly conditioned in three different ways, we hold that they have properly alleged the University engaged in statements or courses of conduct that were *material* to the government's decision with regard to funding.

D. Claim

Finally, relators allege that the University submitted a claim against the government fisc. Relators allege that the University submits false claims in a number of ways—either by submitting requests for Pell Grant funds directly to DOE, resulting in a direct transfer of the funds into a University account, or by submitting requests to private lenders for government-insured loans. We agree with the Seventh Circuit that "it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork." *Main*, 426 F.3d at 916. All that matters is whether the false statement or course of conduct causes the government to "pay out money or to forfeit moneys due." *Harrison*, 176 F.3d at 788. Relators have properly alleged that the University submitted a claim, for purposes of False Claims Act liability.

IV.

Accordingly, because relators in this case have properly alleged (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due, their cause of action under the False Claims Act survives a motion to dismiss, and the decision of the district court is

REVERSED.

APPENDIX B

United States District Court, E.D. California.

UNITED STATES OF AMERICA, ex rel. Mary Hendow and Julie Albertson, Plaintiffs,

v.

UNIVERSITY OF PHOENIX, Defendant.

No. CV S-03-457 GEB DAD.

May 20, 2004.

Daniel Robert Bartley, Attorney at Law, Novato, CA, Nancy Gail Krop, Law Office of Nancy Krop, Burlingame, CA, for Plaintiffs.

Bryan B. Arnold, Gibson Dunn and Crutcher, Los Angeles, CA, for Defendant.

ORDER[*]

Defendant University of Phoenix ("UOP") moves to dismiss Relators' Second Amended Complaint ("SAC"), arguing it fails to allege UOP submitted a false or fraudulent claim for payment to the United States in violation of the False Claims Act ("FCA").

Relators allege that an educational institution such as UOP seeking to participate in certain federal student financial aid programs must enter an agreement with the government promising that it will not compensate enrollment counselors

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[*] This matter was determined to be suitable for decision without oral argument. L.R. 78-230(h). BURRELL, J.

based on the number of students who enroll. (SAC ¶ ¶ 14, 24.) Relators further allege that UOP enters such an agreement annually, and knows it will breach that agreement because it compensates enrollment counselors based on the number of students who enroll. (*Id.* ¶ 29.)

UOP argues Relators' FCA claims must be dismissed because Relators do not allege "*an actual false claim* for payment being made to the Government." *United States v. Kitsap Physicians Service*, 314 F.3d 995, 1002 (9th Cir. 2002). "The False Claims Act . . . focuses on the submission of a claim, and does not concern itself with whether or to what extent there exists a menacing underlying scheme." *Id.*

Relators allege "UOP submits a request for [financial aid] funds directly to the Secretary of the United States Department of Education." (SAC ¶ 33.) But they do not allege that those claims contain express false statements. Instead, Relators argue that UOP's claims constitute "implied certification" that UOP is in compliance with its agreement with the government. A false certification of compliance with applicable law only gives rise to an FCA claim if certification of compliance with a particular statute is a prerequisite to obtaining a government benefit. *See United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) (holding that false certification of compliance with federal disability laws did not give rise to FCA claim since payment was not conditional on certification). Relators contend that 20 U.S.C. § 1094(a) imposes such a certification requirement. 20 U.S.C. § 1094(a) provides:

> In order to be an eligible institution for the purposes of [participating in federal student financial aid programs,] an institution must . . . enter into a program participation agreement with the Secretary [of Education]. The agreement shall condition the initial and continuing eligibility of an institution to partici-

> pate in a program upon compliance with the following requirements:
>
> . . . .
>
> The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities. . . .

Since this statute only requires that UOP enter into an agreement, and does not require a certification, Relators' argument is unpersuasive.

Relators alternatively argue that UOP's actions give rise to a "promissory fraud" FCA claim. Promissory fraud can be actionable where a claimant intentionally makes a "false certification" that it will comply with a particular law when such certification is "a prerequisite for the [claimant] to receive [federal] funds," and subsequently submits a claim for payment despite its failure to comply with that law. *Hopper*, 91 F.3d at 1267. Since Relators have not identified any certification which is a prerequisite for UOP to receive federal funds, this argument also fails.[1]

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[1] Relators also argue that UOP makes a certification in "'management assertion letters' written by UOP management for an annual compliance audit . . . performed by an independent certified public accountant." (SAC ¶ 30.) But Relators identify no statute or regulation which makes any certification in these letters a prerequisite to the receipt of federal funds.

UOP requests that the SAC be dismissed with prejudice, and Relators do not request leave to amend. Therefore, the SAC is dismissed with prejudice. Judgment shall be entered in favor of Defendant.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 24 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MARY HENDOW; et al., Plaintiffs – Appellants, v. UNIVERSITY OF PHOENIX, Defendant – Appellee.	No. 04-16247 D.C. No. CV-03-00457-GEB Eastern District of California, Sacramento ORDER

Before: HALL, SILVERMAN, and GRABER, Circuit Judges.

The panel has voted to deny appellee's petition for panel rehearing and has recommended denial of the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX D

UNITED STATES DEPARTMENT OF EDUCATION
FEDERAL STUDENT AID
CASE MANAGEMENT & OVERSIGHT

PROGRAM PARTICIPATION AGREEMENT

Effective Date of Approval:	The date on which this Agreement is signed on behalf of the Secretary of Education
Approval Expiration Date:	June 30, 2007
Reapplication Date:	March 31, 2007
Name of Institution:	University of Phoenix
Address of Institution:	4615 East Elwood Street Phoenix, AZ 85040-1958
	OPE ID Number: 02098800 DUNS Number: 089306492

Taxpayer Identification Number (TIN): 860344364

The execution of this Agreement by the Institution and the Secretary is a prerequisite to the Institution's initial or continued participation in any Title IV, HEA Program.

The postsecondary educational institution listed above, referred to hereafter as the "Institution," and the United States Secretary of Education, referred to hereafter as the "Secretary," agree that the Institution may participate in those stu-

dent financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA Programs) indicated under this Agreement and further agrees that such participation is subject to the terms and conditions set forth in this Agreement. As used in this Agreement, the term "Department" refers to the U.S. Department of Education.

SCOPE OF COVERAGE

This Agreement applies to all locations of the Institution as stated on the most current ELIGIBILITY AND CERTIFICATION APPROVAL REPORT issued by the Department. This Agreement covers the Institution's eligibility to participate in each of the following listed Title IV, HEA programs, and incorporates by reference the regulations cited.

- FEDERAL PELL GRANT PROGRAM, *20 U.S.C. 1070a et seq; 34 CFR Part 690.*
- FEDERAL FAMILY EDUCATION LOAN PROGRAM, *20 U.S.C. 1071 et seq; 34 CFR Part 682.*
- FEDERAL DIRECT STUDENT LOAN PROGRAM, *20 U.S.C. 1087a et seq; 34 CFR Part 685.*
- FEDERAL PERKINS LOAN PROGRAM, *20 U.S.C. 1087aa et seq; 34 CFR Part 674.*
- FEDERAL SUPPLEMENTAL EDUCATIONAL OPPORTUNITY GRANT PROGRAM, *20 U.S.C. 1070b et seq; 34 CFR Part 676.*
- FEDERAL WORK-STUDY PROGRAM, *42 U.S.C. 2751 et seq; 34 CFR Part 675.*

GENERAL TERMS AND CONDITIONS

1. The Institution understands and agrees that it is subject to and will comply with the program statutes and implementing regulations for institutional eligibility as set forth in 34 CFR Part 600 and for each Title IV, HEA

program in which it participates, as well as the general provisions set forth in Part F and Part G of Title IV of the HEA, and the Student Assistance General Provisions regulations set forth in 34 CFR Part 668.
The recitation of any portion of the statute or regulations in this Agreement does not limit the Institution's obligation to comply with other applicable statutes and regulations.

2. a. The Institution certifies that on the date it signs this Agreement, it has a drug abuse prevention program in operation that it has determined is accessible to any officer, employee, or student at the Institution.

   b. The Institution certifies that on the date it signs this Agreement, it is in compliance with the disclosure requirements of Section 485(f) of the HEA (Campus Security Policy and Crime Statistics).

3. The Institution agrees to comply with—

   a. Title VI of the Civil Rights Act of 1964, as amended, and the implementing regulations, 34 CFR Parts 100 and 101 (barring discrimination on the basis of race, color or national origin);

   b. Title IX of the Education Amendments of 1972 and the implementing regulations, 34 CFR Part 106 (barring discrimination on the basis of sex);

   c. The Family Rights and Privacy Act of 1974 and the implementing regulations, 34 CFR Part 99;

   d. Section 504 of the Rehabilitation Act of 1973 and the implementing regulations, 34 CFR Part 104 (barring discrimination on the basis of physical handicap); and

   e. The Age Discrimination Act of 1975 and the implementing regulations, 34 CFR Part 110.

4. The Institution acknowledges that 34 CFR Parts 602 and 667 require accrediting agencies, State regulatory bodies, and the Secretary to share information about institutions. The Institution agrees that the Secretary, any accrediting agency recognized by the Secretary, and any State regulatory body may share or report information to one another about the Institution without limitation.

5. The Institution acknowledges that the HEA prohibits the Secretary from recognizing the accreditation of any institution of higher education unless that institution agrees to submit any dispute involving the final denial, withdrawal, or termination of accreditation to initial arbitration prior to any other legal action.

SELECTED PROVISIONS FROM GENERAL PROVISIONS REGULATIONS, 34 CFR PART 668

By entering into this Program Participation Agreement, the Institution agrees that:

(1) It will comply with all statutory provisions of or applicable to Title IV of the HEA, all applicable regulatory provisions prescribed under that statutory authority, and all applicable special arrangements, agreements, and limitations entered into under the authority of statutes applicable to Title IV of the HEA, including the requirement that the institution will use funds it receives under any Title IV, HEA program and any interest or other earnings thereon, solely for the purposes specified in and in accordance with that program;

(2) As a fiduciary responsible for administering Federal funds, if the institution is permitted to request funds under a Title IV, HEA program advance payment method, the institution will time its requests for funds under the program to meet the institution's immediate Title IV, HEA program needs;

(3) It will not request from or charge any student a fee for processing or handling any application, form, or data required to determine a student's eligibility for, and amount of, Title IV, HEA program assistance;

(4) It will establish and maintain such administrative and fiscal procedures and records as may be necessary to ensure proper and efficient administration of funds received from the Secretary or from students under the Title IV, HEA programs, together with assurances that the institution will provide, upon request and in a timely manner, information relating to the administrative capability and financial responsibility of the institution to—

(i) The Secretary;

(ii) The State [regulatory bodies] for the State or States in which the institution or any of the institution's branch campuses or other locations are located;

(iii) A guaranty agency, as defined in 34 CFR part 682, that guarantees loans made under the Federal Stafford Loan, and Federal PLUS programs for attendance at the institution or any of the institution's branch campuses or other locations;

(iv) The nationally recognized accrediting agency that accredits or preaccredits the institution or any of the institution's branch campuses, other locations, or educational programs;

(v) The State agency that legally authorizes the institution and any branch campus or other location of the institution to provide postsecondary education; and

(vi) In the case of a public postsecondary vocational educational institution that is approved by a State agency recognized for the approval of public postsecondary vocational education, that State agency;

(5) It will comply with the provisions of §668.15 relating to factors of financial responsibility;

(6) It will comply with the provisions of §668.16 relating to standards of administrative capability;

(7) It will submit reports to the Secretary and, in the case of an institution participating in the Federal Stafford Loan, Federal PLUS, or the Federal Perkins Loan Program, to holders of loans made to the institution's students under these programs at such times and containing such information as the Secretary may reasonably require to carry out the purpose of the Title IV, HEA programs;

(8) It will not provide any statement to any student or certification to any lender under the Federal Stafford Loan or Federal PLUS Program that qualifies the student for a loan or loans in excess of the amount that the student is eligible to borrow in accordance with §§425(a), 428(a)(2), 428(b)(1)(A) and (B), and 428H of the HEA;

(9) It will comply with the requirements of Subpart D of 34 CFR part §§668 concerning institutional and financial assistance information for students and prospective students;

(10) In the case of an institution that advertises job placement rates as a means of attracting students to enroll in the institution, it will make available to prospective students, at or before the time that those students apply for enrollment—

(i) The most recent available data concerning employment statistics, graduation statistics, and any other information necessary to substantiate the truthfulness of the advertisements; and

(ii) Relevant State licensing requirements of the State in which the institution is located for any job for which an educational program offered by the institution is designed to prepare those prospective students;

(11) In the case of an institution participating in the Federal Stafford Loan, or Federal PLUS Program, the institution will inform all eligible borrowers, as defined in 34 CFR part 682, enrolled in the institution about the availability and eligibility of those borrowers for State grant assistance from the State in which the institution is located, and will inform borrowers from another State of the source for further information concerning State grant assistance from that State;

(12) It will provide the certifications described in paragraph (c) of this section;

(13) In the case of an institution whose students receive financial assistance pursuant to section 484(d) of the HEA, the institution will make available to those students a program proven successful in assisting students in obtaining the recognized equivalent of a high school diploma;

(14) It will not deny any form of Federal financial aid to any eligible student solely on the grounds that the student is participating in a program of study abroad approved for credit by the institution;

(15) In the case of an institution seeking to participate for the first time in the Federal Stafford Loan and Federal PLUS programs, the institution has included a default management plan as part of its application under §600.20 for participation in those programs and will use the plan for at least two years from the date of that application. The Secretary considers the requirements of this paragraph to be satisfied by a default management plan developed in accordance with the default reduction measures described in the June 2001 Dear Partner Letter, GEN-01-08;

(16) In the case of an institution that changes ownership that results in a change of control, or that changes its status as a main campus, branch campus, or an additional location, the institution will, to participate in the Federal Stafford Loan and Federal PLUS Programs, develop a default management

plan for approval by the Secretary and implement the plan for at least two years after the change in control or status. The Secretary considers the requirements of this paragraph to be satisfied by a default management plan developed in accordance with the default reduction measures described in the June 2001 Dear Partner Letter, GEN-01-08;

(17) The Secretary, guaranty agencies and lenders as defined in 34 CFR Part 682, nationally recognized accrediting agencies, the Secretary of Veterans Affairs, State [regulatory bodies], State agencies recognized under 34 CFR part 603 for the approval of public postsecondary vocational education, and State agencies that legally authorize institutions and branch campuses or other locations of institutions to provide postsecondary education, have the authority to share with each other any information pertaining to the institution's eligibility for or participation in the Title I, HEA programs or any information on fraud and abuse;

(18) It will not knowingly—

(i) Employ in a capacity that involves the administration of the Title IV, HEA programs or the receipt of funds under those program, an individual who has been convicted of, or has pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or has been administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds;

(ii) Contract with an institution or third-party servicer that has been terminated under section 432 of the HEA for a reason involving the acquisition, use, or expenditure of Federal, State, or local government funds, or that has been administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds; or

(iii) Contract with or employ any individual, agency, or organization that has been, or whose officers or employees have been—

(A) Convicted of, or pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds; or

(B) Administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds;

(19) It will complete, in a timely manner and to the satisfaction of the Secretary, surveys conducted as a part of the Integrated Postsecondary Education Data System (IPEDS) or any other Federal collection effort, as designated by the Secretary, regarding data on postsecondary institutions;

(20) In the case of an institution that offers athletically related student aid, it will comply with the provisions of paragraph (d) of this section;

(21) It will not impose any penalty, including, but not limited to, the assessment of late fees, the denial of access to classes, libraries, or other institutional facilities, or the requirement that the student borrow additional funds for which interest or other charges are assessed, on any student because of the student's inability to meet his or her financial obligations to the institution as a result of the delayed disbursement of the proceeds of a Title IV, HEA program loan due to compliance with statutory and regulatory requirements of or applicable to the Title IV, HEA programs, or delays attributable to the institution;

(22) It will not provide nor contract with any entity that provides, any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the awarding of student financial assis-

tance, except that this requirement shall not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal Student Assistance. This provision does not apply to the giving of token gifts to students or alumni for referring students for admission to the institution as long as: the gift is not in the form of money, check, or money order; no more than one such gift is given to any student or alumnus; and the gift has a value of not more than $100;

(23) It will meet the requirements established pursuant to Part H of Title IV of the HEA by the Secretary, State [authorizing bodies], and nationally recognized accrediting agencies;

(24) It will comply with the refund provisions established in 34 CFR Part 668.22;

(25) It is liable for all improperly administered funds received or refunded under the Title IV, HEA programs, including any funds administered by a third-party servicer;

(26) If the stated objectives of an educational program of the institution are to prepare a student for gainful employment in a recognized occupation, the institution will—

(i) Demonstrate a reasonable relationship between the length of the program and entry level requirements for the recognized occupation for which the program prepares the student. The Secretary considers the relationship to be reasonable if the number of clock hours provided in the program does not exceed by more than 50 percent the minimum number of clock hours required for training in the recognized occupation for which the program prepares the student, as established by the State in which the program is offered, if the State has established such a requirement, or as established by any Federal agency; and

(ii) Establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the student.

(c) In order to participate in any Title IV, HEA program (other than the SSIG and NEISP programs), the institution must certify that it—

(1) Has in operation a drug abuse prevention program that the institution has determined to be accessible to any officer, employee, or student at the institution; and

(2)(i) Has established a campus security policy in accordance with section 485(f) of the HEA; and

(ii) Has complied with the disclosure requirements of §668.47 as required by section 485(f) of the HEA.

(d) In order to participate in any Title IV, HEA program (other than the SSIG and NEISP programs), an institution that offers athletically related student aid must—

(1) Cause an annual compilation, independently audited not less often than every 3 years, to be prepared within 6 months after the end of the institution's fiscal year, of—

(i) The revenues derived by the institution from the institution's intercollegiate athletics activities, according to the following categories:

(A) Total revenues.

(B) Revenues from football.

(C) Revenues from men's basketball.

(D) Revenues from women's basketball.

(E) Revenues from all other men's sports combined.

(F) Revenues from all other women's sports combined;

(ii) Expenses made by the institution for the institution's intercollegiate athletics activities, according to the following categories:

(A) Total expenses.

(B) Expenses attributable to football.

(C) Expenses attributable to men's basketball.

(D) Expenses attributable to women's basketball.

(E) Expenses attributable to all other men's sports combined.

(F) Expenses attributable to all other women's sports combined; and

(iii) The total revenues and operating expenses of the institution; and

(2) Make the compilation and, where allowable by State law, the results of the audits required by paragraph (d)(1) of this section available for inspection by the Secretary and the public.

(e) For the purposes of paragraph (d) of this section—

(1) Revenues from intercollegiate athletics activities allocable to a sport shall include without limitation gate receipts, broadcast revenues and other conference distributions, appearance guarantees and options, concessions, and advertising;

(2) Revenues such as student activities fees, alumni contributions, and investment interest income that are not allocable to a sport shall be included in the calculation of total revenues only;

(3) Expenses for intercollegiate athletics activities allocable to a sport shall include without limitation grants-in-aid, salaries, travel, equipment, and supplies; and

(4) Expenses such as general and administrative overhead that are not allocable to a sport shall be included in the calculation of total expenses only.

(f)(1) A program participation agreement becomes effective on the date that the Secretary signs the agreement.

(2) A new program participation agreement supersedes any prior program participation agreement between the Secretary and the institution.

(g)(1)(i) With respect to an institution that has been certified *other than under a provisional certification*—

(A) Except as provided in paragraphs (h) and (i) of this section, the Secretary terminates a program participation agreement through the proceedings in subpart G of this part.

(B) An institution may terminate a program participation agreement.

(C) If the Secretary or the institution terminates a program participation agreement under paragraph (g) of this section, the Secretary establishes the termination date.

(2) With respect to an institution that has been *provisionally certified,* the Secretary revokes a provisional certification through the proceedings in §668.13(d).

(h) An institution's program participation agreement automatically expires on the date that—

(1) The institution changes ownership that results in a change in control as determined by the Secretary under 34 CFR part 600; or

(2) The institution's participation ends under the provisions of §668.26(a)(1), (2), (4), or (7).

(i) An institution's program participation agreement no longer applies to or covers a location of the institution as of the date on which that location ceases to be a part of the participating institution.

WILLIAM D. FORD FEDERAL DIRECT LOAN PROGRAM

If an institution participates in the William D. Ford Federal Direct Loan (Direct Loan) Program, the institution and its representatives shall comply with the statute, guidelines,

and regulations governing the Title IV, Part D, William D. Ford Federal Direct Loan Program as required by Section 454 of Public Law 103-66.

The institution will:

1. Provide for the establishment and maintenance of a Direct Loan Program at the Institution that will:

   Identify eligible students who seek student financial assistance in accordance with Section 484 of the Higher Education Act of 1965, as amended (the HEA).

   Estimate the need of students as required under Title IV, Part F of the HEA.

   Provide a certification statement of eligibility for students to receive loans that will not exceed the annual or aggregate limits, except the Institution may exercise its authority, under exceptional circumstances identified by the Secretary, to refuse to certify a statement that permits a student to receive a loan, or certify a loan amount that is less than the student's determination of need, if the reason for such action is documented and provided in written form to a student.

   Establish a schedule for disbursement of loan proceeds to meet the requirements of Section 428G of the HEA.

   Provide timely and accurate information to the Secretary concerning 1) the status of borrowers while students are in attendance, any new information pertaining to the status of student borrowers of which the Institution becomes aware after the student leaves the Institution, and 2) the utilization of Federal funds under Part D at such times and in such manner as prescribed by the Secretary.

2. Comply with requirements established by the Secretary relating to student loan information with respect to the Direct Loan Program.

3. Provide that students at the Institution and their parents (with respect to such students) will be eligible to participate in the programs under Title IV, Part B of the HEA, Federal Family Education Loan programs, at the discretion of the Secretary for the period during which such Institution participates in the Direct Loan Program, except that a student or parent may not receive loans under both Part B and Part D of the HEA for the same period of enrollment.

4. Provide for the implementation of a quality assurance system, as established by the Secretary and developed in consultation with Institutions of higher education, to ensure that the Institution is complying with program requirements and meeting program objectives.

5. Provide that the Institution will not charge any fees of any kind, regardless of how they are described, to student or parent borrowers for loan application, or origination activities (if applicable), or the provision and processing of any information necessary for a student or parent to receive a loan under Part D of the HEA.

6. Provide that the Institution will originate loans to eligible students and parents in accordance with the requirements of Part D of the HEA and use funds advanced to it solely for that purpose (Option 2 only).

7. Provide that the note or evidence of obligation of the loan shall be the property of the Secretary (Options 2 and 1 only).

8. Implement such other provisions as the Secretary determines are necessary to protect the interest of the United States and to promote the purposes of Part D of the HEA.

9. Accept responsibility and financial liability stemming from its failure to perform its functions under this Program Participation Agreement.

The Institution's continued approval to participate in the Direct Loan Program will be based on the Department of Education's review and approval of the Institution's future applications for recertification to continue participating in the federal student aid programs.

CERTIFICATIONS REQUIRED FROM INSTITUTIONS

The Institution should refer to the regulations cited below. Signature on this Agreement provides for compliance with certification requirements under 34 CFR Part 82, "New Restrictions on Lobbying," and 34 CFR Part 85, "Government-wide Debarment and Suspension (Nonprocurement) and Government-wide Requirement for Drug-Free Workplace (Grants)." Breach of any of these certificates constitutes a breach of this Agreement.

PART 1 CERTIFICATION REGARDING LOBBYING; DEBARMENT, SUSPENSION AND OTHER RESPONSIBILITY MATTERS; AND DRUG-FREE WORKPLACE REQUIREMENTS

1. Lobbying

As required by Section 1352, Title 31 of the U.S. Code, and implemented at 34 CFR Part 82, for persons entering into a grant or cooperative agreement over $100,000, as defined at 34 CFR Part 82, Sections 82.105, and 82.110, the Institution certifies that:

(a) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making of any Federal grant; the entering into of any cooperative agreement, and the extension, continuation, renewal,

amendment, or modification of any Federal grant or cooperative agreement;

(b) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal Grant or cooperative agreement, the Institution shall complete and submit Standard Form – LLL, "Disclosure Form to Report Lobbying," in accordance with all subrecipients shall certify and disclose accordingly.

(c) The Institution shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subgrants, contracts under grants and cooperative agreements, and subcontracts) and that all subrecipients shall certify and disclose accordingly.

2. Debarment, Suspension, and Other Responsibility Matters

As required by Executive Order 12549, Debarment and Suspension, and implemented at 34 CFR Part 85, for prospective participants in primary covered transactions as defined at 34 CFR Part 85, Sections 85.105 and 85.110, the Institution certifies that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this application been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local)

transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application had one or more public transactions (Federal, State, or local) terminated for cause or default.

3. Drug-Free Workplace (Grantees Other Than Individuals)

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, as defined at 34 CFR Part 85, Sections 85.605, and 85.610—

The Institution certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an on-going drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The Institution's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement, and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar day after such conviction;

(e) Notifying the agency, in writing, within 10 calendar days after receiving notice under this subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to: Director, Grants and Contracts Service, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 3124, GSA Regional Office Building No. 3), Washington, DC 20202-5140. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1972, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or

local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e), and (f).

4. Drug-Free Workplace (Grantees Who Are Individuals)

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, as defined at 34 CFR Part 85, Sections 85.605, and 85.610—

1. As a condition of the grant, the Institution certifies that it will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant; and

2. If any officer or owner of the Institution is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, the Institution will report the conviction, in writing, within 10 calendar days of the conviction, to: Director, Grants and Contracts Service, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 3124, GSA Regional Office Building No. 3), Washington, DC 20202-5140. Notice shall include the identification number(s) of each affected grant.

PART 2 U.S. DEPARTMENT OF EDUCATION DRUG PREVENTION CERTIFICATION

The undersigned Institution certifies that it has adopted and implemented a drug prevention program for its students and employees that, at a minimum, includes—

1. The annual distribution in writing to each employee, and to each student who is taking one or more classes for any kind of academic credit except for continuing education units, regardless of the length of the student's program of study, of:

- Standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities.
- A description of the applicable legal sanctions under local, State or Federal law for the unlawful possession or distribution of illicit drugs and alcohol.
- A description of the health risks associated with the use of illicit drugs and the abuse of alcohol.
- A clear statement that the Institution will impose disciplinary sanctions on students and employees (consistent with local, State and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violation of the standards of conduct. A disciplinary sanction may include the completion of an appropriate rehabilitation program.
- A description of any drug or alcohol counseling, treatment, or re-entry programs that are available to employees or students.

2. A biennial review by the Institution of its program to:
   - Determine its effectiveness and implement changes to the program if they are needed.
   - Ensure that its disciplinary sanctions are consistently enforced.

PART 3 CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY, AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS

The Institution is to obtain the signatures of Lower Tier Contractors on facsimiles of the certification reproduced below, and retain in the Institution's files.

CERTIFICATION BY LOWER TIER CONTRACTOR
(Before Completing Certification, Read Instructions for This Part 3 below)

(1) The prospective lower tier participant certifies by submission of this proposal, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal Department or Agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Name of Lower Tier Organization	PR/Award Number or Project Name
Name of Authorized Representative	Title of Authorized Representative
Signature of Authorized Representative	Date

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this

transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms "covered transactions," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to whom this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion—Lower Tier Covered Transactions," without modification, in all

lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

NOTE: The "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions" form is to be retained by the Institution.

IN WITNESS WHEREOF

the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

Signature of Institution's
Chief Executive Officer: /s/ Date 6/13/2003

Print Name and Title: Todd Nelson
President and Chief Executive Officer

For the Secretary: /s/ Date 7-2-2003
U.S. Department of Education

APPENDIX E

UNITED STATES DEPARTMENT OF EDUCATION

THE DEPUTY SECRETARY

October 30, 2002

MEMORANDUM

TO: Terri Shaw
Chief Operating Officer
Federal Student Aid

FROM: William D. Hansen /s/
Deputy Secretary

SUBJECT: Enforcement policy for violations of incentive compensation prohibition by institutions participating in student aid programs

The purpose of this memorandum is to provide direction with regard to the Department's response to violations of section 487(a)(20) of the Higher Education Act, which prohibits participating institutions' payment of incentive compensation to any persons or entities engaged in student recruiting where such payments are based on student enrollment.[1]

---

[1] Section 487(a)(20) also references incentive compensation for individuals engaged in some activities other than recruiting on behalf of an institution. While there have been few occasions where improper compensation for those other activities has come to the Department's attention, those activities should also be considered as covered by the direction in this Memorandum.

The statutory prohibition was designed to reduce the financial incentive for an institution to enroll students by misrepresenting the quality of the institution, or the ability of students to benefit from its educational programs. The Department has in the past measured the damages resulting from a violation as the total amount of student aid provided to each improperly recruited student. After further analysis, I have concluded that the preferable approach is to view a violation of the incentive compensation prohibition as not resulting in monetary loss to the Department. Improper recruiting does not render a recruited student ineligible to receive student aid funds for attendance at the institution on whose behalf the recruiting is conducted. Accordingly, the Department should treat a violation of the law as a compliance matter for which remedial or punitive sanctions should be considered.

In some instances, violations of the prohibition, either themselves or in combination with other program violations, may constitute a basis for limitation, suspension, or termination action. However, much more commonly, the appropriate sanction to consider will be the imposition of a fine.

Violations of the prohibition are to be considered as consisting of the incentive payments to any persons or entities engaged in any student recruiting that relate to the number of students enrolled as a result of the recruiting. In determining the amount of a fine, the Office of Federal Student Aid (FSA) is to take into account the extent to which the institution appeared to be knowingly violating the law, as would be evidenced, for example, by attempts to disguise its compensation plan and by other aggravating factors, such as documented misrepresentations to prospective students. On the other hand, mitigating factors such as arguable reliance on Department guidance and on the reasonable advice of legal counsel, among other things, should also be taken into account. The size of the payments to persons or entities engaged in student recruiting and the pervasiveness of the improper practices across an institution's enrollments should

also bear on the magnitude of the fine to be imposed. In the exercise of its discretion, FSA may deem factors not described herein to be relevant to the determination of the amount of a fine.

The direction provided by this memorandum should result in the imposition of appropriately measured sanctions for improper incentive payments by institutions. I am confident that FSA will exercise sound discretion in assessing sanctions for violations of the incentive compensation prohibition.

cc: Brian W. Jones
General Counsel

Sally L. Stroup
Assistant Secretary, Office of Postsecondary Education

(2)

No. 06-1006

FILED
MAR 23 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

UNIVERSITY OF PHOENIX,

Petitioner,

v.

UNITED STATES EX REL. MARY HENDOW AND JULIE ALBERTSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Higher Education Act ("HEA") mandates that an educational institution is ineligible to submit any requests for Title IV student loan and grant funds without first executing an agreement with the Secretary of Education, the Program Participation Agreement ("PPA"), promising to comply with the HEA incentive compensation ban. *See* 20 U.S.C. §1094(a)(20). The HEA incentive compensation ban prohibits schools from compensating recruiters based upon the number of students they enroll. *Id.* Each PPA expressly incorporates the HEA statutory language conditioning a school's "initial and continuing" eligibility to receive Title IV funds on compliance with the HEA specific statutory requirements, including the HEA statutory incentive compensation ban. In short, no school may request or receive any student loan or grant funds without first promising in the PPA to comply with the incentive compensation ban 34 C.F.R. 668.14(b)(22)(i).

The question presented in this case is whether an institution's knowingly false promises to comply with the HEA incentive compensation ban in the mandatory PPAs are actionable under the False Claims Act where those false statements cause the Government to grant the institution's subsequent requests for Title IV student education funds.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents submit this Statement:

The Respondents, Julie Albertson and Mary Hendow, individuals, reside in the State of California and were employed by the Petitioner, University of Phoenix.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Mary Hendow and Julie Albertson respectfully submit this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions of The False Claims Act quoted in the petition, this case involves The Higher Education Act. Title 20 U.S.C. § 1094 provides, in relevant part:

§ 1094. Program participation agreements

(a) Required for programs of assistance; contents

In order to be an eligible institution . . ., an institution . . . shall . . . enter into a program participation agreement with the Secretary. The agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following requirements:

[. . .]

(20) The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance . . . . .

STATEMENT

Petitioner presents no "compelling reason" for this Court to grant its petition for writ of certiorari. *See* Sup. Ct. R. 10. The decision below does not conflict with any decision by this Court or any court of appeals. The lower court expressly approved the only lower court decision squarely addressing the issues presented in this case. *United States ex rel Main v.*

Oakland City University, 426 F.3d 914, *reh. den.* (7th Cir. 2005), *cert den.* (April 17, 2006) ("*Main*")(upholding the False Claims Act promissory fraud claim based on nearly identical allegations of violating the Higher Education Act incentive compensation ban). Pet. App.11a -13a.

The allegations, in short, are these schools lie to access government funds. The FCA makes liable anyone who "knowingly makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2). Relators allege UOP knowingly makes false statements of compliance with the Higher Education Act ("HEA") incentive compensation ban causing the Government to pay the school's Title IV funding requests. As the lower court recognized, an "axiomatic fit" exists between these complaint allegations and the FCA statute imposing liability on the use of a false statement to access federal funds. Pet. App. 2a.

There is no circuit conflict regarding the narrow lower court decision. The lower court *agree*d with other circuits that the false statement must be material to payment by the Government on a claim. The lower court *agreed* with other circuits that, for a promissory fraud claim, the complaint must allege facts showing that the promise was false when made. The lower court "course of conduct" language does not address the implied false certification theory (the lower court expressly declined to address this theory) but rather affirms promissory fraud precedent of this Court and other circuits.

Nor does the decision threaten financial ruin to law-abiding institutions for unknowing mistakes unrelated to government payment on a claim. Rather, the lower court emphasized the false statement must be knowing (as opposed to an unintentional mistake) and "material to the government's decision to pay out moneys to the claimant." Pet. App at 9a. Furthermore, Petitioner selected the wrong vehicle for this "the sky is falling" rhetoric. The HEA incentive compensation ban

is anything but obscure, set forth in the HEA funding statute, the implementing regulations, and the multiple PPAs executed by Petitioner. Pet. App. 15a-16a. The complaint alleges UOP not only knows of the statutory ban, but also brags that it "creates 'smoke and mirrors'" so UOP can "fly under the radar," while executing agreements with the Government promising to comply with the ban. Pet. App.3a-5a, 14a; Resp. App. 3a-6a.

Given the lack of any conflict among the circuits on the issues presented, and the interlocutory nature of the decision below, review by this Court is not warranted. As in *Main*, the petition for a writ of certiorari should be denied.

1. In Title IV of The Higher Education Act of 1965 ("HEA"), Pub. L. No. 89-329, 79 Stat.1219, Congress established various student loan and grant programs, including the Federal Pell Grant Program ("Pell"), the Federal Family Education Loan Program ("FFELP"), and the Federal Direct Loan Program ("FDLP"). Each program requires compliance with specific conditions as a prerequisite to obtaining federal funds. Thus, to become eligible to receive Title IV funds, or to have its students receive funds, under these programs, a school must first enter into a Program Participation Agreement ("PPA") with DOE which "shall condition the initial and continuing eligibility of the school to participate in a program upon compliance with" specific requirements. 20 U.S.C. § 1094(a). See also 34 C.F.R. § 668.14.

The statutory requirement at issue in this case, set forth in the HEA funding statute and replicated in the PPA, is that schools "will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any person or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance." 20 U.S.C. 1094(a)(20). Thus, by statutory command, the initial and continuing eligibility of schools to obtain Title IV funding depends on a requirement that those schools

not pay certain types of commissions. Known commonly as the "incentive compensation ban," this statutory mandate is echoed in a regulation specifying the requirements to which schools must expressly agree to adhere in PPAs. *See* 34 C.F.R. 668.14(b)(22)(i).

Based upon evidence of shocking abuses by proprietary schools using the Student Financial Assistance Program, Congress in 1992 enacted the incentive compensation ban, to curb the risk that recruiters will "sign up poorly qualified students who will derive little benefit from the subsidy and may be unable or unwilling to repay federally guaranteed loans." Pet. App. 2a. During congressional hearings, Congress determined, "One of the most widely abused areas of those observed during the Subcommittee's investigation lies in admissions and recruitment practices." *Abuses in Federal Student Aid Programs*, 102 S. Rep. 58 (1991) ("Report"). The Subcommittee found proprietary schools victimized their students:

> Fraud and abuse in the GSLP have had perhaps the most profound and disastrous effect on the intended beneficiaries of the Federal student aid, the students. The Subcommittee heard testimony that unscrupulous and dishonest school operators victimize students, leaving them with huge debts and little or no education.

Id.

The congressional investigation noted the differences between colleges and universities, on the one hand, and proprietary trade schools, on the other, lead to such abuses:

> For example, colleges and universities do not employ commissioned sales representatives, while proprietary schools commonly use such personnel in their marketing efforts . . .

Id. (noting testimony "that contests were held whereby sales representatives earned incentive awards for enrolling the highest number of student[s] for a given period"); H.R. Rep. No. 102-447, at 10, *reprinted in* 1992 U.S.C.C.A.N. 334, 343 (noting that the "new provisions include prohibiting the use of commissioned sales persons and recruiters").

After a school becomes eligible to receive Title IV funds by entering into a PPA, the school then submits requests for grant funds on behalf of its students directly to the DOE. Under loan programs, the school and students jointly submit requests to private lenders for loans that are then guaranteed by state agencies and are, in turn, insured by the DOE and paid in the event of a default. No matter how a claim is ultimately submitted to the Government, however, the disbursement of federal funds is contingent upon the school executing mandatory statements of compliance with the HEA incentive compensation ban before requests for payment are considered. Such statements thus cause the submission of all subsequent claims for payment under any of these programs.

2. This case involves allegations under the False Claims Act, 31 U.S.C. § 3729, *et seq.*, that the Petitioner, the University of Phoenix ("UOP"), knowingly makes "false statements" by promising to comply with the HEA incentive compensation ban in multiple executed agreements with the DOE, to become eligible (and *remain* eligible) to receive Title IV funds, that these statements were false when made, and that the false statements caused the DOE to pay subsequently submitted claims for Title IV funds. The *qui tam* relators, Respondents Mary Hendow and Julie Albertson (former UOP enrollment counselors), allege UOP's knowing submissions of false PPAs to become eligible to receive Title IV funds are false claims, and cause the submission of false claims, to the Government, in violation of 31 U.S.C. § 3729(a)(2).

Relators allege UOP knowingly violates the statutory ban on incentive compensation by basing enrollment counselor

salary on enrollments and awarding trips and prizes to enrollment contest winners. Pet. App. 3a. Relator Albertson alleges that her salary increased by more than $50,000 upon reaching a specific target number of students to recruit. Pet. App. 3a. Relators allege UOP "urges enrollment counselors to enroll students without reviewing their transcripts to determine their academic qualifications to atte ıd the university." Pet. App. 3a. This was precisely the harm leading Congress to enact the HEA incentive compensation ban.

Relators also allege considerable fraud by UOP to mask its violation of the incentive compensation ban. Relators allege "UOP senior management openly brag to UOP employees about duping the federal government regarding the UOP compensation scheme." Resp. App. 3a. Relators allege these senior officials "boast that they create 'smoke and mirrors' so that UOP can 'fly under the radar' of the United States Department of Education regarding its illegal compensation scheme." Resp. App. 3a-6a. Relators furthermore assert the UOP corporate head of enrollment openly brags: "It's all about the numbers. It will always be about the numbers. But we need to show the Department of Education what they want to see." Pet. App. 4a. To deceive the DOE, relators allege UOP creates two separate employment files for its enrollment counselors – one *"real"* file containing performance reviews based on improper quantitative factors, and one *"fake"* file containing performance reviews based on legitimate qualitative factors. Relators allege the fake file is the only file shown to the DOE. Relators allege a series of UOP policy changes deliberately designed to obscure counselors are compensated on a per-student basis. Pet. App. 4a.

Once relators came forward to the Government, the DOE commenced a program review of UOP policies and procedures regarding recruiter compensation. After conducting site visits, gathering and analyzing compensation documents, and interviewing enrollment directors, managers and sixty counselors,

the DOE, in 2004, issued a "Program Review" confirming the relators' allegations that "UOP is in direct violation of Sec. 487(a)(20) of the Higher Education Act" (the HEA incentive compensation ban). Resp. App. 9a-14a.

Among other things, the DOE found "UOP reinforces to recruiters that UOP evaluates and *pays them solely on the basis of how many students they enroll*." Resp. App. 12a (emphasis added). The DOE reported UOP creates a "corporate culture" that "flaunts the Department's regulations and the prohibition against incentive compensation based on enrollments." Resp. App. 13a. The DOE reported UOP "systematically and intentionally operates in a duplicitous manner so as to violate the Department's prohibition against incentive compensation while evading detection." Resp. App. 14a. The DOE investigation confirmed relators' allegations that UOP maintains separate books to evade detection. Resp. App. 10a. The DOE also reported "UOP systematically established terminology and procedures to hide the fact that UOP pays distinct and significant financial incentives solely based on recruiters' success in securing enrollments." Resp. App. 13a.

The DOE found recruiters are "pressured to enroll students who are not qualified." Resp. App 11a. Directly linking the illegal practices to the student harm Congress sought to address in enacting the HEA incentive compensation ban, the DOE reported UOP "provides substantial incentives to its staff to recruit unqualified students and students who cannot benefit from the training offered." Resp. App. 14a.

In light of these DOE findings, UOP executed a settlement agreement to pay the DOE $9.8 million, the largest resolution ever of a DOE program review. That agreement expressly *does not* release UOP for liability under the False Claims Act.

4. In the False Claims Act district court action, UOP moved to dismiss the relators' complaint on the ground the relators failed to state a claim under either a false certification

or a promissory fraud theory of liability. On May 20, 2004, the district court dismissed relators' complaint with prejudice under Fed. R. Civ. P. 12(b)(6). The court rejected relators' claim under the "false certification" theory because the Higher Education Act "only requires that [the University] enter into an agreement, and does not require a certification." Pet. App. 5a. And, the court rejected relators' claim under the "promissory fraud" theory, because they did not "identif[y] any certification which is a prerequisite for [the University] to receive federal funds." Pet. App. 5a.

5. The court of appeals reversed. Finding the "relators have raised allegations that the University of Phoenix knowingly made false statements, and caused false statements to be made, that resulted in the payment by the federal Department of Education of hundreds of millions of dollars," the court concluded there was an "axiomatic fit between the operative statute and the allegations made." Pet. App. 2a. After addressing the elements necessary to state a claim under both a false certification and a promissory fraud theory of FCA liability, *id.* 5a-12a, the court held relators stated an actionable claim under both theories, *id.* 13a-19a.[1]

a. The court of appeals first summarized the prerequisites for liability under a false certification theory. Among other things, the court emphasized the need for "a *false* claim, rather than a mere unintentional violation." Pet. App. 8a (emphasis in the original). The court also stressed that the defendant must have knowledge of the claim's falsity. *Ibid.* (noting prior precedents making "clear that a palpably false statement, known to be a lie when it is made, is required for a party to be found liable under the False Claims Act"). In discussing the false

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[1] Although the United States declined to intervene and take over this case in district court, the Government filed an amicus brief in the court of appeals, arguing that the district court erred in dismissing the relators' claims. Pet. App. 5a (noting the participation of the Department of Justice as amicus).

statements imposing FCA liability under the false certification theory, the court explained that, contrary to the district court's understanding, the lie did not have to be labeled a "certification." The court stated that while the liability theory is called "false certification," it could "just as easily be called the "false statement of compliance with a government regulation that is a precursor to government funding theory, but that is not as succinct." Pet. App. 9a. As the lower court pointed out, the FCA imposes liability based upon a "false statement" as opposed to a "certification." Pet. App. 9a.

In addition to a false claim and the defendant's knowledge of its falsity, the court of appeals held "the false statement or course of conduct must be material to the government's decision to pay out moneys to the claimant." Pet. App. 9a. Citing its prior decision in *United States ex rel. Hopper v. Anton*, 91 F.3d 1261 (9th Cir. 1996), and endorsing decisions by other circuits holding that "government funding must be 'conditioned' upon certifications of compliance," *ibid.*, the court again emphasized "there is no special significance to the term 'certification' in determining materiality; the question is merely whether the false certification – or assertion, or statement – was relevant to the government's decision to confer a benefit," *id.* at 10a. Finally, the court affirmed that, for FCA liability, "it is necessary that it involve an actual *claim*, which is to say, a call on the government fisc." *Id.* at 10a.[2]

The court of appeals next examined the "promissory fraud" or "fraud in the inducement" theory of liability. Pet. App. 10a-13a. Under that theory, the court explained, "liability will attach to each claim submitted to the Government under a

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[2] In reciting the elements of liability for an express false certification claim, the court of appeals expressly *declined* to address the question of liability under an implied false certification theory, because it was "beyond dispute" that University of Phoenix "signed the written Program Participation Agreement, thus making an express statement of compliance." Pet App.9a-10a n.1.

contract, when the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct." *Id.* at 11a. Noting that "[t]he Seventh Circuit recently adopted a version of the promissory fraud theory in a case almost identical to this one," the court expressly adopted the analysis and holding of that case. *Id.* at 11a-12a (citing *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005), *cert. denied*, 126 S.Ct. 1785 (2006)).

Summarizing the express false certification and promissory fraud liability theories, the lower court concluded "the essential elements of False Claims Act liability remain the same: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due." Pet. App. 13a.

b. Applying these principles, the court of appeals concluded the relators alleged facts satisfying each of the four elements necessary for FCA liability. Pet. App. 13a-19a.

The court held the relators alleged false statements by UOP in its Program Participation Agreements promising compliance with the statutory ban on paying incentive compensation to recruiters, that UOP repeatedly violated those promises, and that UOP "did so knowingly, and with the specific intent to deceive the government." Pet. App. 13a-14a. In so holding, the court specifically rejected UOP's argument that allowing the claims in this case to proceed exposed universities to enormous liabilities "for innocent regulatory violations." *Id.* at 14a. The court reiterated that "innocent or unintentional violations do not lead to False Claims Act liability." *Ibid.*

The court of appeals also held that violations of the incentive compensation ban are "material" to the Government's payment decisions because compliance with that requirement is clearly a prerequisite to the receipt of *any* federal funding under the relevant programs. Pet. App. 14a-19a. The court explained that a school's eligibility for Title IV funds — "and thus, the

funding that is associated with such eligibility — is *explicitly* conditioned, in three different ways, on compliance with the incentive compensation ban." Pet. App. 15a (emphasis in the original). The court cited the HEA funding statute, 20 U.S.C. § 1094(a), the HEA implementing regulation, 34 C.F.R. § 668.14(a) (1), and the PPA language, stressing that all three "demonstrate that compliance with the incentive compensation ban is a necessary condition of continued eligibility and participation" in Title VI funding programs. *Id.* 15a-16a. "The statute, regulation, and agreement here all explicitly condition participation and payment on compliance with, among other things, the precise requirement that relators allege that the University knowingly disregarded." *Id.* 16a.

The court of appeals also rejected UOP's argument that the incentive compensation ban "is merely a condition of *participation*, not a condition of *payment*," noting, "[I]n this case, that is a distinction without a difference." *Id.*16a. The court dismissed the notion that the false statements necessary for program participation were unrelated to funding decisions:

> These conditions are also "prerequisites," and "the *sine qua non*" of federal funding, for one basic reason: if the University had not agreed to comply with them, it would not have gotten paid.

Id at 17a.

Finally, the court of appeals held relators adequately alleged that UOP "submits false claims in a number of ways – either by submitting requests for Pell Grant funds directly to DOE, resulting in a direct transfer of the funds into a University account, or by submitting requests to private lenders for government-insured loans." Pet. App. 19a. As the court summarized, "[a]ll that matters is whether the false statement or course of conduct causes the government to 'pay out money or to forfeit moneys due.'" *Id.* at 19a (citation omitted).

REASONS FOR DENYING THE PETITION

The decision below is correct and does not conflict with any decision by this Court or any court of appeals. The only other court of appeals that squarely addressed the issues presented in this case issued a decision fully consistent with the decision below. In *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005), *cert. denied*, 126 S.Ct. 1785 (2006), the Seventh Circuit Court of Appeals reversed the dismissal of a *qui tam* relator's action against a proprietary educational institution alleging identical violations of the incentive compensation ban and the False Claims Act, and this Court recently denied the defendant's petition for certiorari in that case. The same result is warranted here.

The court of appeals' decision reflects the common sense proposition that the False Claims Act prohibits lying to obtain government benefits in all its forms and not merely statements that can be characterized as false "certifications" regarding compliance with prerequisites for the receipt of government benefits. The decision also tracks the plain language of the FCA, which applies broadly to any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. 3729(a)(2).

Petitioner summarily asserts the court of appeals' decision "disregards the statute's plain language," Pet. 9, but Petitioner offers virtually no textual analysis of the False Claims Act to support this contention. Nor can any such analysis be made because the lower court tracks the statutory language by requiring that the false statement be the "'the *sine qua non*' of federal funding." Pet. App.17a. Instead, Petitioner primarily contends the decision below conflicts with decisions by other courts of appeals. However, to manufacture any plausible claims of conflict with precedent in other circuits, Petitioner grossly mischaracterizes both the decisions in other cases and what the court of appeals in this case actually held.

As explained more fully below, Petitioner's argument that the decision below conflicts with decisions holding that a false statement must relate to "conditions of payment," Pet. 10-18, is plainly wrong, because the court of appeals found that the incentive compensation ban is *both* a condition of program participation *and* a condition of payment. Pet. App. 17a (noting that, if UOP had not agreed to comply with that condition, "it would not have gotten paid").

Likewise, Petitioner's contention that the decision below conflicts with decisions holding an express false statement is a prerequisite to a false certification claim, Pet. 19-22, is without merit, because the court of appeals in this case found that UOP made *express* false statements and thus declined to address the question of liability under an implied false certification theory. Pet. App. 9a-10a n.1.

Finally, Petitioner's argument the decision below conflicts with decisions imposing a "strict pleading threshold on promissory fraud claims," Pet. 22, lacks merit because there is no special pleading requirement for promissory fraud claims, and the court of appeals in this case properly concluded Respondents satisfied the pleading requirements for a promissory fraud claim by alleging that UOP's promises of compliance with the incentive compensation ban were knowingly false when made. Pet. App. 14a.

In the end, Petitioner's arguments for further review boil down to the bald assertion that the court of appeals' decision opens the door to enormous potential liabilities for educational institutions and businesses that knowingly defraud the Government. As an initial matter, this argument is entirely speculative, as the decision below does not actually impose liability on anyone, but rather merely permits a claim to proceed on the merits beyond the motion to dismiss stage. More importantly, though, the court of appeals' decision does not, as Petitioner suggests, threaten FCA liability for simple noncompliance with "obscure" regulatory conditions. To the contrary, as the court

of appeals took great care to emphasize, an educational institution may be liable under the False Claims Act only where (1) it made *knowingly* false statements to the Government (*e.g.*, lies, rather than mere negligent missteps) regarding compliance with (2) conditions necessary for the receipt of government benefits (*e.g.*, requirements that are *material* to the Government's payment decisions). There is nothing novel or unusual about that holding. It does not pose an inordinate chilling effect on any business attempting in good faith to comply with statutory funding requirements in government programs. In short, Petitioner's policy arguments provide no compelling basis for further review by this Court.

I. THE COURT OF APPEALS' DECISION IS CORRECT

The court of appeals correctly held Respondents stated a valid claim for relief under the False Claims Act by alleging UOP repeatedly lied about its compliance with the statutory incentive compensation ban in order to obtain – and *maintain* – its eligibility to receive Title IV funds. Relying upon the plain language of the FCA, which prohibits the knowing use of "a false record or statement to get a false or fraudulent claim paid or approved," 31 U.S.C. § 3729(a) (2), the court declared there is an "axiomatic fit" between the operative statute and the allegations in the complaint. Pet. App. 2a. Thus, the court properly concluded the Respondents satisfied the essential pleading requirements under the express false certification and promissory fraud theories of liability. Pet. App. 13a-19a.

As the court of appeals explained, a university's eligibility to obtain Title IV funds 'is *explicitly* conditioned, in three different ways, on compliance with the incentive compensation ban." Pet. App. 15a (emphasis in original). The federal funding statute, 20 U.S.C. § 1094(a) & (a) (20), federal regulations, 34 C.F.R. § 668.14(a) (1), and mandatory Program Participation Agreements "all explicitly condition participation *and payment* on compliance with, among other things, the precise requirement that relators allege that the University

knowingly disregarded." Pet. App. 16a (emphasis added). As a result, the court had no difficulty concluding that compliance with the incentive compensation ban was material to the Government's funding decisions.

Moreover, given Respondents' specific allegations regarding UOP's repeated and knowing violations of the incentive compensation ban, and its knowingly false promises to comply with that requirement, the court held Respondents "have properly alleged (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out moneys due." Pet. App. 19a; *see also*, Pet. App. 3a-5a, 14a.

The court of appeals' holding, and its analysis of the essential elements necessary for liability under the False Claims Act, are consistent not only with the plain language of the FCA, but also with numerous decisions by this Court imposing liability in similar circumstances. See, *e.g.*, *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (holding electrical contractors who rigged bids on municipal contracts funded by federal government liable for causing municipalities to submit false claims). Indeed, this Court has stated that the FCA is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968).

Likewise, the legislative history of the 1986 amendments to the False Claims Act confirms that the statute applies "even though the services are provided as claimed if, for example, the claimant *is ineligible to participate in the program.*" S. Rep. 345, 99th Cong., 2d Sess., at 9, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274 (emphasis added).

Petitioner makes no serious argument that the court of appeals' decision is contrary to the plain language of the FCA

or any decision by this Court.[3] Instead, Petitioner contends primarily that the court's decision conflicts with decisions by other courts of appeals. In order to make those arguments, however, Petitioner grossly mischaracterizes both the court of appeals' decision in this case and governing precedent in other circuits. Based on its misunderstandings of these decisions, Petitioner contends the decision below threatens enormous new liabilities under the FCA. As discussed below, these claims lack merit.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH PRECEDENTIAL DECISIONS BY ANY COURT OF APPEALS

The court of appeals' essential holding – that UOP's knowingly false promises to comply with a statutory prerequisite for receiving Title IV funds are actionable under the FCA – *does not* conflict with the precedential decisions of any other courts of appeals. To the contrary, in *Main*, the Seventh Circuit Court of Appeals recently reversed the dismissal of virtually identical claims under the FCA alleging systematic violations of the incentive compensation ban by a for-profit educational institution. The lower court herein expressly adopted the Seventh Circuit's reasoning in *Main*, see Pet. App. 12a. Petitioner makes no real effort to distinguish *Main* from this case.

As in *Main*, this complaint alleges that UOP promised to comply with the HEA incentive compensation ban, that those promises of compliance were core requirements for the receipt

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[3] Although Petitioner cites *United States v. McNinch*, 356 U.S. 595, 599 (1958), for the proposition Congress did not intend for the False Claims Act "to reach every kind of fraud practiced on the Government," *see* Pet. 2, 8, 24, Petitioner offers no analysis of the *McNinch* decision, and nowhere attempts to reconcile that decision with this Court's more recent declarations that the False Claims Act is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *Neifert-White Co.*, 390 U.S. at 232. Petitioner thus presents no plausible argument that the decision below conflicts with any decision of this Court.

of *any* Title IV funds, and that those promises were false when made. Pet. App. 3a-5a, 14a. Even though the false promises were not expressly reiterated in claims for payment submitted directly to the Government, the Seventh Circuit had no difficulty concluding they fell within the FCA language imposing liability on anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a) (2). As the Seventh Circuit explained:

> The University 'uses' its phase-one application (and the resulting certification of eligibility) when it makes (or 'causes' a student to make or use) a phase-two application for payment. No more is required under the statute. The phase-two application is itself false because it represents that the student is enrolled in an eligible institution, which isn't true. *Main*, 426 F.3d at 916.

Thus, despite Petitioner's arguments that the decision below conflicts with other appellate decisions, the only other court of appeals squarely addressing the claims and legal issues presented in this case rendered a decision entirely consistent with the decision below. This Court recently denied the petition for certiorari filed in *Main*. The same result is warranted here.

A. The Decision Below Does Not Conflict With Decisions of Other Courts of Appeals Distinguishing Between Conditions of Eligibility and Conditions of Payment Because The Incentive Compensation Ban Is Both a Condition of Eligibility And a Condition of Payment

Petitioner's principal argument is that the court of appeals' decision in this case conflicts with decisions from other circuits

"holding that fraud in connection with a condition of payment is a prerequisite to a false certification claim." Pet. 10.

That argument is wholly without merit for one simple reason: the court of appeals in this case held that compliance with the incentive compensation ban *is* a condition of payment. As the court explained, the promises to comply set forth in the Program Participation Agreement are "'the *sine qua non*' of federal funding, for one basic reason: if the University had not agreed to comply with them, it would not have gotten paid." Pet. App. 17a.

Because the court of appeals concluded that the requirement at issue in this case is a condition of *payment,* the distinction some courts have drawn between conditions of payment and conditions of eligibility is *not implicated* in this case. Indeed, the court of appeals in this case cited and *agreed with* many of the same cases that Petitioner now contends "conflict" with the decision below. Compare Pet. App. 6a (citing, *inter alia*, *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 786 (4th Cir. 1999); *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 697-700 (2d Cir. 2001)), *with* Pet. 12 (citing *Harrison*); Pet. 14 (citing *Mikes*).

Likewise, the court of appeals endorsed its precedent holding that FCA liability attaches only where there is fraud in connection with "a prerequisite to obtaining a government benefit." Pet. App. 7a (quoting *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266-67 (9th Cir.1996)).

Thus, the decision below *does not* endorse any expansive new theory of FCA liability, and *does not* conflict with decisions drawing a distinction between conditions of payment and conditions of eligibility for participation in a program.

The decisions Petitioner cites simply do not stand for the proposition that a condition of program eligibility can never support a claim under the False Claims Act. Rather, consistent with the holding in this case, those decisions recognize that the

violation of a condition of eligibility can render a claim false when it also qualifies as a condition of payment. Thus, in *Harrision*, the Fourth Circuit held that the defendant's failure to disclose a conflict of interest, which was a "prerequisite for subcontract approval" – that is, a condition of eligibility for the contract – "fits squarely into the false certification cases." *Harrison*, 176 F.3d at 794.

Likewise, in *United States ex rel. Thompson v. Columbia/ HCA Healthcare Corp.*, 125 F.3d 899 (5th Cir. 1997), the Fifth Circuit remanded the case to the district court for a determination as to whether the certifications in the Medicare cost reports were not only conditions of participation but also prerequisites to payment and, on remand, the district court held that the Government "relied on the certifications in determining the issues of payment and retention of payment *as well as* continued eligibility for participation in the Medicare program." *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1020 (S.D. Tex. 1998) (emphasis added). Thus, both *Harrison* and *Thompson* recognize that a condition of eligibility can also be a condition of payment that serves as the predicate for an FCA claim.[4]

Ultimately, Petitioner's desperate attempt to manufacture a "conflict" between the decision below and decisions in other courts of appeals rests on Petitioner's insistence that compliance with the incentive compensation ban "is a threshold

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[4] Although the Second Circuit Court of Appeals in *Mikes* refused to find liability based on a particular condition of Medicare program eligibility, the court did not purport to hold that all conditions of eligibility were outside the scope of the FCA, but merely that the specific requirement at issue in that case did not constitute a prerequisite to payment. *Mikes*, 274 F.3d at 701-02. As the court of appeals in this case explained, the Second Circuit's decision in *Mikes* was motivated in large part by considerations unique to the Medicare context. Pet. App. 18a. Nothing in *Mikes* is inconsistent with the Ninth Circuit Court of Appeals' holding that the HEA incentive compensation ban is both a condition of eligibility and a condition of payment.

condition of eligibility to participate in the Title IV program, rather than a condition of payment." Pet. 11. On this point, however, there is *no circuit split* – there is *unanimity*.

As Petitioner concedes, see Pet. 11, in *Main* the Seventh Circuit also concluded that the incentive compensation ban *is* a condition of payment, noting "it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork." *Main*, 426 F.3d at 916. The lower court here echoed that view, observing "in this case" the distinction between conditions of participation and conditions of payment "is a distinction without a difference." Pet. App. 16a.

The court of appeals correctly held that compliance with the incentive compensation ban is both a condition of payment and of program participation. As the court explained in rejecting Petitioner's proposed distinction between promises of *future* compliance and statements that an institution *has* complied with certain conditions, all the required statements of compliance in the Program Participation Agreements are conditions of payment under the HEA funding scheme, because, if UOP had not made them, "it would not have gotten paid." Pet. App. 17a. Moreover, the court recognized,"[i]f such promises were not conditions of payment, the University would be virtually unfettered in its ability to receive funds from the government while flouting the law." *Id.*

Petitioner nowhere even acknowledges the court's holding that the incentive compensation ban is not merely a condition of participation, but is also a condition of payment. Nor does Petitioner explain why that conclusion is wrong, much less why that issue – the proper characterization of a condition on federal funding in a specific statute – is sufficiently important to warrant this Court's attention.

Indeed, the only support Petitioner offers for its view that the incentive compensation ban is "merely" a condition of participation is a district court decision affirmed in an

unpublished Fifth Circuit memorandum opinion. Pet. 13 (citing *United States ex rel. Graves v. ITT Educational Servs, Inc.*, 284 F.Supp. 2d 487, (S.D.Tex. 2003), *aff'd*, 111 F. App'x 296 (5thCir. 2004)). But the Fifth Circuit did not undertake any analysis of this question in *Graves*, and its *per curiam* opinion affirming the district court makes clear that the "opinion should not be published and is *not precedent* except under the limited circumstances set forth in 5th Cir. R. 47.5.4."

In light of the Seventh Circuit's published decision in *Main* rejecting similar efforts to discount the incentive compensation ban as "merely" a condition of program eligibility, Petitioner cannot plausibly contend there is any real circuit split on the question whether the incentive compensation ban can properly be viewed as a condition of payment.

In sum, because the lower court held the incentive compensation ban is a condition of payment *as well as* a condition of program eligibility, this decision plainly does not "conflict" with any decisions purporting to distinguish between conditions of payment and conditions of participation. This decision is fully consistent with the Seventh Circuit's decision in *Main*, and it does not permit any new or expansive form of FCA liability.

B. The Decision Below Does Not Conflict With Decisions Of Other Courts Requiring An Explicit False Statement, Because Petitioner Made Explicit False Statements Concerning Compliance With The Incentive Compensation Ban In Its Program Participation Agreements.

Likewise, Petitioner's argument that the decision below conflicts with decisions from other circuits "holding that a false representation is a prerequisite to a false certification claim," Pet. 19, is without merit. Here again, Petitioner's claim of conflict rests on a fundamental misunderstanding of what the court below actually held. Although Petitioner suggests the

court of appeals in this case recognized an expansive theory of liability under an *implied* certification theory, the court below *specifically* held it was *not* addressing "the viability of this theory, because it is beyond dispute that UOP signed written Program Participation Agreements, thus making an express statement of compliance." Pet. App. 9a, n.1. In light of the court's holding that UOP made *express* false statements in its Program Participation Agreements, no credible argument can be made that the decision below expands liability under an implied certification theory.

To manufacture some claim of conflict with decisions in other circuits, Petitioner focuses on language in the decision below stating that the first element of FCA liability is "a false statement or fraudulent course of conduct." Pet. App. 13a. According to Petitioner, the court of appeals' reference to a "fraudulent course of conduct" jettisons the requirement of an express false statement for false certification liability and is therefore at odds with decisions in other circuits. Pet. 12.

But the language Petitioner cites *does no such thing.* To the contrary, as noted above, the court of appeals repeatedly emphasized UOP made *express* false statements and it therefore was unnecessary to consider the scope of potential liability for a "fraudulent course of conduct" under an implied certification theory. Pet. App. 9a-10a n.1

Read in proper context, the language Petitioner cites is best understood as a description of the first element of a *promissory fraud* theory of liability rather than a false certification theory. Pet. App. 13a (reciting the elements necessary "under either the false certification theory or the promissory fraud theory"). That understanding is fully consistent with decisions in other circuits explaining that a "fraudulent course of conduct" is the first element of a promissory fraud claim. See *e.g.*, *Harrison v. Westinghouse Savannah River Co*, 176 F.3d at 786-787. As the court of appeals in this case made clear, its references to a "fraudulent course of conduct" do not in any way expand

liability under a false certification theory but instead relate solely to the promissory fraud theory of liability: "In short, therefore, under a promissory fraud theory, relator must allege a false or fraudulent *course of conduct*, made with scienter." Pet. App.13a (emphasis added).

Because a "fraudulent course of conduct" is plainly a sufficient basis for FCA liability under a promissory fraud theory, the court of appeals' use of that language in describing that theory was entirely proper and does not conflict with any decisions by this Court or any other court of appeals. See *Hess*, 317 U.S. at 542 (recognizing promissory fraud theory of liability based on collusive bidding to obtain government contracts); *Harrison*, 176 F.3d at 787-88 (recognizing promissory fraud theory of liability based on submission of false information to the Government to obtain contract).

C. The Decision Below Does Not Conflict With Court Decisions Requiring Prompt Failure To Follow PromisesBecause Petitioner Falsely Represented Compliance With The Incentive Compensation Ban, Knowing It Violated That Ban, And Intending To Continue To Do So In The Future.

Nor is there any merit to Petitioner's contention that the decision below conflicts with decisions from other circuits "imposing a strict pleading requirement on promissory fraud claims." Pet. 22. To the contrary, the court of appeals' analysis of promissory fraud is entirely consistent with the Seventh Circuit's decision in *Main*, recognizing the viability of promissory fraud claims virtually identical to the ones in this case. Like the Seventh Circuit, the court of appeals in this case explained that the critical element of promissory fraud claims is that "the promise must be false when made." Pet. App. 12a (quoting *Hopper*, 91 F.3d at 1267). Compare *Main*, 426 F.3d at 917 (explaining that "failure to honor one's promise is (just) breach of contract, but making a promise that one *intends* not

to keep is fraud"). The court of appeals held Respondents satisfied this requirement by alleging Petitioner repeatedly and knowingly made false promises to comply with the incentive compensation ban while not intending to honor those promises. Pet. App. 14a.

Petitioner nowhere acknowledges the detailed allegations of knowing fraud in Respondent's complaint. Pet. App. 3a-5a, 14a; Resp. App. 1a-8a. Instead, Petitioner simply asserts the court of appeals established a "relaxed standard for pleading promissory fraud" that "virtually guarantees that a claim will survive a motion to dismiss and that the defendant will face significant pressure to settle even the most dubious of promissory fraud claims." Pet. 24.

Here again, however, Petitioner's contention the court of appeals recognized an expansive new theory of FCA liability rests on misleading assertions about the court's holding and shocking misstatements regarding the import of decisions in other circuits. For example, Petitioner quotes the D.C. Circuit's observation in *United States ex rel Bettis v. Odebrrecht Contractors of Cal., Inc.*, 393 F.3d 1321 (D.C. Cir. 2005), that "there is no inference of fraudulent intent not to perform from the mere fact that a promise made is subsequently not performed." Pet. 23 (quoting *Bettis*, 393 F.3d at 1329-30). But *Bettis* was decided on a motion for summary judgment and thus concerned the *evidence* necessary to support a promissory fraud claim, not (as here) the adequacy of pleadings required to survive a threshold motion to dismiss.

The only other decision Petitioner cites to support its argument that other circuits have imposed a "strict pleading threshold on promissory fraud claims," Pet. 22, is *United States ex rel Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375 (5th Cir. 2003), and Petitioner's reliance on that decision is equally flawed. Although *Willard* (unlike *Bettis*) was decided on a motion to dismiss, the Fifth Circuit dismissed the one-sentence allegation of fraud in that case for failure to satisfy

the specific requirements for pleading fraud set forth in Fed. R. Civ. P. 9(b). *Willard*, 336 F.3d at 386. But the heightened pleading requirements of Rule 9(b) are not at issue in this appeal, and, Respondents' detailed fact allegations in this case contrast markedly with the conclusory, one-sentence fact allegation that the Fifth Circuit found inadequate in *Willard*. See Pet. App. 13a-14a (summarizing relator's allegations); Resp. App. 1a-8a (alleging that, while UOP executes its PPAs, senior executives boast to employees about creating "smoke and mirrors" so UOP may "fly under the radar," deceiving the DOE by re-titling documents, maintaining two sets of books, and other deceptive practices).

In short, Petitioner's contention that the decision below conflicts with decisions in other circuits imposing strict pleading requirements on promissory fraud claims is wholly without merit. No further review by this Court is warranted to address this issue or any of the other claims of "conflict" with other circuits that Petitioner seeks to manufacture.

III. THE COURT OF APPEALS' DECISION DOES NOT THREATEN FINANCIAL RUIN FROM UNINTENTIONAL VIOLATIONS OF OBSCURE REGULATIONS, BECAUSE ONLY KNOWING VIOLATION OF LAWS MATERIAL TO GOVERNMENT PAYMENT ON A CLAIM IMPOSE FALSE CLAIMS ACT LIABILITY

In addition to alleged circuit conflicts, a secondary theme permeating the petition is innuendo that the court of appeals' decision threatens ruinous financial liability for substantially law-abiding entities contracting with the Government or participating in federal funding programs. Petitioner argues that review by this Court is warranted to prevent "potentially devastating FCA liability based upon noncompliance with *any* of the extensive regulations that govern participation in the federal financial aid program.") Pet. 16 (emphasis added).

Contrary to Petitioner's arguments, however, the specter of massive FCA liability based on unwitting violations of program requirements is entirely illusory, and is not supported by the record. As the court of appeals took great care to explain, liability under the FCA *may not* be predicated on immaterial regulatory missteps or merely negligent noncompliance with applicable requirements. Pet. App. 7a (reaffirming prior circuit precedent holding that "[m]ere regulatory violations do not give rise to a viable FCA action"). The decision below *does not* support imposing FCA liability upon a government contractor over its commission of a minor regulatory infraction. To the contrary, the court below made abundantly clear that FCA liability arises *only* from (1) *knowingly* false statements regarding requirements that are (2) *material* prerequisites for the receipt of government benefits. Pet. App. 13a.

The lower court discussed at length the "central importance" of scienter for a False Claim Act claim, citing to its precedent requiring a false statement made "with knowledge of the falsity and with intent to deceive." Pet. App. 8a. Stated another way, the lower court emphasized the necessity of a "palpably false statement, known to be a lie when it is made." Pet. App. 8a.

Secondly, the lower court affirmed its own precedent and that of other circuits mandating that the false statement must be "material to the government's decision to pay out moneys to the claimant." Pet. App. 9a-10a. The lower court affirmed its precedent that a central focus is "(1) whether the false statement is the cause of the Government's providing the benefit, and (2) whether any relation exists between the subject matter of the false statement and the even triggering Government's [sic] loss." Pet. App. 9a, citing to *Hopper v. Anton, supra*, 91 F.3d at 1266.

In sum, the opinion below does not apply to regulatory violations unrelated to government payment decisions. There

must be an *intent to deceive* the Government *on a material issue determining the Government's payment* on a claim.

The case allegations furthermore make this case the wrong vehicle for Petitioner's slippery-slope claim that this decision expands FCA liability to encompass mere regulatory violations unrelated to Government payment. The condition at issue, the HEA incentive compensation ban, is explicitly stated not only in the HEA funding statute itself, but also in the implementing regulations and multiple executed contracts with the DOE. Relators' powerful complaint allegations, detailing UOP's conscious deception of the Government, are a quantum leap beyond mere inadvertent violations. Relators allege that while UOP executes agreements with the Government promising to honor the funding statute's incentive compensation ban, UOP boasts about creating "smoke and mirrors" to "fly under the radar" of the Government regarding UOP's illegal compensation system. Relators furthermore allege UOP maintains two sets of books, deceptively re-titles documents, and uses code terms in a blatant and knowing effort to hide its illegal conduct. Pet. App. 3a-5a, 15a; Resp. App. 1a-8a.

A government review confirmed relators' allegations that UOP "systematically and intentionally operates in a duplicitous manner so as to violate the Department's prohibition against incentive compensation while evading detection." Resp. App. 14a.

The Seventh Circuit dismissed similar policy arguments in *Main*, see 426 F.3d at 917 (rejecting defendant's argument that the relator's approach "would treat any violation of federal regulations in a funding program as actionable fraud"). The court of appeals herein likewise properly dismissed Petitioner's contention that the court's holding "opens [UOP] up to greater liability for innocent regulatory violations." Pet. App. 14a. See also *Main*, 426 F.3d at 917 ("Tripping up on a regulatory complexity does not entail a knowingly false representation").

In sum, there is no basis for Petitioner's arguments that the decision below opens the floodgates to substantial new (and unfair) liabilities under the FCA for violations of "obscure" or technical regulatory requirements.

As the HEA funding statute makes clear, and the court of appeals in this case properly held, the incentive compensation ban has a direct nexus to government payment decisions. In light of substantial evidence demonstrating that payment of incentive compensation to recruiters fundamentally undermines federal student grant and lending programs, (see e.g., *Abuses in Federal Student Aid Programs*, 102 S. Rep. 58 (1991), Congress specifically prohibited the payment of Title IV funds to any institution that engaged in that practice and also required express promises from institutions not to pay such compensation in order to maintain their eligibility for those funds. 20 U.S.C. 1094(a) & (a) (20).

Given the obvious importance and centrality of this condition on the receipt of government benefits, Petitioner's "sky-is-falling" rhetoric regarding the possibility of FCA liability based on "obscure" regulatory requirements is utterly misplaced.[5]

IV. THE COURT OF APPEALS' DECISION IS INTERLOCUTORY

A final reason for denying the petition for certiorari in this case is that the decision below is interlocutory. See *Brother-*

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[5] Petitioner's reliance upon an internal Department of Education memo, to argue that violations of the HEA incentive compensation ban do not cause the Government monetary loss or necessarily prevent program participation, is disingenuous. The Court of Appeals for the Seventh Circuit previously disposed of this same "back-office" memo argument. *Main*, 426 F.3d at 917. The memo is merely non-binding commentary, disbursed without public notice, and comment that does not lawfully supercede the HEA statute (20 U.S.C. § 1094(a) (20)), the HEA regulations (34 C.F.R. § 668.14(b)(22)(i)), and the multiple executed PPAs – *all* of which the Ninth Circuit found *expressly* to condition government payment of student financial aid funds on UOP's compliance with the incentive compensation ban. Pet. App. 15a-16a.

hood of Locomotive Firemen v. Bangor & Aroostook RR., 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."). Absent extraordinary circumstances, this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). Because petitioner has not identified any extraordinary circumstances warranting a departure from this rule, review of the interlocutory ruling by this Court of Appeals is not warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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March 23, 2007

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.* MARY HENDOW and JULIE ALBERTSON,, Plaintiffs,

vs.

UNIVERSITY OF PHOENIX and DOES 1-500, Inclusive, Defendants.

Case No. CIV. S-03-0457 GEB DAD

SECOND AMENDED COMPLAINT FOR DAMAGES, WITH DEMAND FOR JURY TRIAL

Causes of Action:

1. Knowingly False Statements to Get a False or Fraudulent Claim Paid or Approved, in Violation of the False Claims Act, 31 U.S.C. § 3729(a)(1).

2. Knowingly False Records or Statements to Get a False or Fraudulent Claim Paid or Approved, in Violation of the False Claims Act, 31 U.S.C. § 3729(a)(2).

1. (a) This is an action to recover damages and civil penalties on behalf of the United States of America arising out of false claims approved and presented by Defendants to obtain over one-half billion dollars annually from the United States Department of Education pursuant to the Higher Education Act, Title IV ("HEA"), from at least January 1, 1997, continually through the present. (b) Defendant University of Phoenix ("UOP") is the largest recipient of HEA federal student financial aid funds from the United States Department of Education. (c) In requesting and receiving at least one-half billion dollars annually, Defendants falsely represent every year that they are in compliance with HEA's prohibition against using incentive payments for recruiters for recruiting activities, which is a core prerequisite to eligibility for the Title IV funds. (d) Defendants had, and continue to have, actual knowledge that they are not adhering to the HEA ban, that their representations of adherence were and are false, and that they therefore were and are submitting false or fraudulent representations of compliance. (e) Alternatively, Defendants act and acted with deliberate indifference and/or reckless disregard as to the truth or falsity of the claims. (f) Relators assert causes of action under the False Claims Act for submission of a knowingly false or fraudulent claims for payment or approval, and knowingly false records or statements to get a false or fraudulent claim paid or approved, in violation of 31 U.S.C. § 3729(a)(1) and (2).

[. . . .]

17. (a) UOP, in flagrant violation of the Title IV ban, compensates enrollment counselors, including Relators, based directly upon enrollment activities. (b) UOP publishes charts (called matrix) setting forth the enrollment activity numbers necessary for a performance rating (such as "exceeds expectations" or "meets expectations"). (c) Along with the matrix charts, UOP publishes its salary schedules, with a salary range corresponding to each performance rating. (d) An enrollment counselor thus knows his or her salary range, based on her enrollment activities level. (e) UOP furthermore "stack ranks" counselors based upon their number of enrollments. (f) The top ranking counselors are among the highest paid

counselors, receiving the highest salary as well as incentive trips, awards and gifts based upon their enrollment numbers.

18. (a) To boost its enrollment numbers, UOP Corporate Enrollment urges enrollment counselors to enroll students without reviewing their transcripts to determine their academic qualifications to attend the university. (b) This process leads to student disqualification from UOP (or additional financial costs for the students to take additional classes) and financial disaster for the students forced to repay the federal loans while UOP collects the federal funds for these fraudulently "enrolled" students.

19. (a) *UOP is fully aware of the illegality of its compensation scheme.* (b) UOP senior management openly brag to UOP employees about duping the federal government regarding the UOP compensation scheme. (c) They boast that they create "smoke and mirrors" so that UOP can "fly under the radar" of the United States Department of Education regarding its illegal compensation scheme.

20. (a) UOP disguises its illegal compensation scheme in many ways. (b) UOP retitles documents to mask the illegal compensation scheme. (c) For example, until recently, UOP titled its monthly reports to enrollment counselors verifying student enrollments "*Commissioned Starts*"("starts" refers to student enrollments). (d) UOP creates its "stack rankings" from these reports. (e) Once the federal government began fining institutions for violating the HEA incentive compensation ban, UOP continued its compensation scheme and simply renamed the reports, removing the "commissioned starts" from the document title.

21. (a) To further mask its illegal compensation scheme, UOP maintains separate review files on the enrollment counselors. (b) One file contains legitimate review criteria produced to the federal government, and the other secret file containing the actual, illegal quantitative enrollment review criteria.

22. UOP also developed a glossary of "code words" used in documents to further disguise that compensation is based solely on enrollment activities.

B. UOP's False Certifications of Compliance to the Government, Required by Law for Eligibility to Receive the Federal Funds

[. . . .]

29. (a) UOP, in requesting and receiving its over one-half billion dollars a year in Title IV funds, every year falsely certifies to the DOE compliance with the incentive compensation ban in the Agreement it submits annually to the DOE. (b) UOP falsely induces the Government to approve and/or pay out the Title IV funds, based on its false promises to comply with the incentive compensation ban. (c) The promises when made are false. (d) Upon making its promises and certifications, UOP knowingly engages in the illegal incentive compensation schemes detailed below.

30. (a) UOP every year also falsely asserts compliance with the incentive compensation ban in "management assertion letters" written by UOP management for an annual compliance audit. (b) UOP must submit to the United States Government this annual compliance audit performed by an independent certified public accountant. (c) Participation in the Title IV program is conditioned upon UOP submitting these audits certifying compliance with the HEA incentive compensation ban. (d) UOP is ineligible to submit any claims for HEA funds unless it submits this annual audit.

31. (a) As a required part of the audit, UOP certifies in a management assertion letter that it had "not paid to any persons or entities any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments . . . for each year at issue." (b) UOP knows this certification is false because UOP intentionally violates the incentive compensation ban.

C. UOP's Claims for the Federal Government Funds

32. (a) Upon entering the Program Participation Agreement with the United States Secretary of Education, UOP is eligible to request the Title IV funds from the United States Secretary of Education (for Pell Grant funds) or from third party lenders (for government-insured loans).

33. (a) For Pell Grant funds, UOP submits a request for those funds directly to the Secretary of the United States Department of Education. (b) The request for funds is not a student application but a request prepared and transmitted by UOP to the Secretary of the United States Department of Education, stating the requested amount of funds. (c) The United States Department of Education transfers the Pell Grant funds electronically directly into a UOP account. (d) Upon receiving the Pell Grant funds, UOP credits various UOP students for tuition paid. (e) A UOP student does not request or receive a dime of the Pell Grant funds.

34. (a) UOP's claims for the Pell Grant funds are fraudulent. (b) When UOP requests, receives and retains the Pell Grant funds, UOP knows it is ineligible for those funds because of its intentional violations of the Higher Education Act incentive compensation ban. (c) UOP knows that compliance with the Higher Education Act funding statute incentive compensation restriction is a core prerequisite for an institution's eligibility to request and receive Title IV funds.

35. (a) For government-insured loans, including the FFELP, UOP submits the request for those funds directly to a private lender. (b) The UOP request for government-insured loan funds, arranged, managed and prepared by UOP, includes a student application that *contains an express certification by UOP that the student is an eligible student under the Title IV program.* (c) The claim for government-insured loans *must* include this UOP certification. (d) UOP knows that this claim for funds is false because UOP knows its students are *not* eligible under the Title IV program due to UOP's violations of the HEA incentive compensation ban. (e) *Only* students at eligible Title IV schools may receive credit for Title IV

government-insured loan funds disbursed by private lenders to educational institutions. (f) UOP's fraudulent violations of the HEA incentive compensation ban make it an ineligible educational institution to request and disburse Title IV funds, and thus its students are ineligible under the Title IV program. (g) The lender, typically a bank, transfers the government-insured loan funds directly into a UOP account. (h) Upon receiving the government-insured loan funds, UOP credits various UOP students for tuition paid.

36. (a) UOP's claims for the government-insured loan funds are fraudulent. (b) When UOP requests, receives and retains the government-insured loan funds, UOP knows it is ineligible for those funds because of its intentional violations of the Higher Education Act incentive compensation ban. (c) UOP knows that compliance with the Higher Education Act funding statute incentive compensation restriction is a core prerequisite for an institution's eligibility to request and receive Title IV funds.

[. . . .]

H. Defendant's "Smoke and Mirrors" Cover-up of Its Fraudulent Practices

58. (a) UOP knowingly and intentionally deceives the Department of Education regarding its violations of the HEA ban on incentive compensation for recruiters. (b) As Bill Brebaugh, head of UOP Corporate Enrollment openly brags, UOP masks its illegal compensation scheme through "smoke and mirrors" so that UOP can "fly under the radar" of the Department of Education. (c) Mr. Brebaugh repeatedly emphasizes to the enrollment counselors: "It's all about the numbers. It will always be about the numbers. But we need to show the Department of Education what they want to see."

59. UOP's deceptive tactics include the following:

(a) Separate Enrollment Counselor Personnel Files. (i) UOP maintains two separate files on each enrollment counselor. (ii) Corporate Human Resources maintains the

"official" file, while Corporate Enrollment and the local campuses maintain the other "unofficial" file upon which compensation is based. (iii) The Corporate Human Resources file contains performance reviews showing legitimate qualitative review criteria allegedly used to assess performance. (iv) These factors include "job related skills," "working relationships," "customer service," and "supervisory skills." (v) UOP does not review these factors with its counselor nor rate performance based upon these factors. (vi) Corporate Enrollment (the department tracking enrollment activities) and the local campuses maintain the performance reviews actually used to assess performance and determine compensation, based upon illegal quantitative enrollment activities. (vii) UOP reviews enrollment counselors on a daily, weekly, monthly, quarterly and annual basis. (viii) At these reviews, only quantitative enrollment activities are discussed. (ix) There is no discussion or review of the qualitative factors allegedly impacting performance evaluation. (x) These reviews, establishing counselors' compensation, are based entirely upon the counselors' quantitative enrollment activities (enrollment numbers, appointments (numbers and outcome), outgoing telephone calls, and leads (generated and outcome). (xi) Counselors' quantitative performance of each activity corresponds to a performance rating (such as exceeds or meets expectation) which in turn corresponds to a salary range and merit increase level.

(b) Matrix and Salary Levels Separated. (i) Until recently, UOP wrote the salary range corresponding to the quantitative enrollment activity rating directly on the enrollment activities charts ("matrix"). (ii) Once the Department of Education began fining institutions for compensating based upon enrollment activities, UOP stopped publishing the salary ranges directly on the Matrix. (iii) UOP now publishes the corresponding salary ranges in a separate document.

(c) The Enrollment Activity "Code" Terms on Documents. (i) UOP renamed the category concerning student "enrollments" on its various enrollment counselor evaluation forms to mask that compensation is directly tied to enrollment numbers and activities. (ii) On the matrix, "application" is the

code term for "enrollment." (iii) On the UOP weekly and monthly matrix evaluations of each counselor, "Student Info Card" or "level one card" is the code term for an "enrollment." (iv) UOP refers to its stack rankings as "stack rankings" only in their internal e-mails. The stack rankings are officially titled "Gross New Enrollments"

(d) The Renaming of Enrollment Compensation Documents. (i) UOP publishes monthly reports verifying enrollment counselors enrollment numbers. (ii) Until recently, those reports were titled "Approval of Deferred *Commissionable* Starts" (emphasis added). (iii) A "start" is an enrolled student – a student who has agreed to a payment plan and is attending classes (two nights attended for an undergraduate; or completion of the first three-week course for a graduate student). (iv) After the federal government began prosecuting violations of the HEA recruitment ban, UOP still published the monthly reports, but renamed them "Student and Financial Status" reports or "Enrollments by Rep."

(e) UOP Salary Policy Changes: Salaries No Longer Decrease. (i) Until 1999, UOP enrollment counselors' salaries rose or fell every six months, depending upon the performance category corresponding to their enrollment activities for that evaluation period. (ii) In 1999, to decrease attention to the salary variances, UOP decided that salaries could only rise or fall annually. (iii) Fall 2000, to further mask that its compensation scheme is tied directly to enrollment activity, UOP changed its enrollment counselor salary policy so that salaries could no longer decrease.

(f) The Use of Enrollment Code Terminology. (i) Corporate Enrollment sets enrollment goals through hidden messages. (ii) For example, a fifty-year old Director set a Sperling trip enrollment goal of 50 enrollments in 2000 by announcing, "you know how old I am." (iii) Or, the enrollment goal of 52 for a particular contest was set by Corporate Enrollment by stating "you know how many states there are."

[. . . .]

APPENDIX B

UNITED STATES DEPARTMENT OF EDUCATION
Student Financial Assistance
Schools Channel/Case Management & Oversight
Case Management Team,
Southwest-San Francisco Team
50 United Nations Plaza, Suite 268
San Francisco, California 94102-4987
Voice (415) 556-4295 FAX (415) 437-8206

PROGRAM REVIEW REPORT
PRCN 20034/0922254
University of Phoenix, OPEID 020988 00
Site Visit of 8/18/2003 — 8/22/2003

[. . . .]

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• "The matrix talks about customer service, communications, judgment; but when you talk to your manager, your manager tells you that it is the enrollments that count."

• "The amount of money was dependent on how many students I enrolled. Other factors, such as communication, are not mentioned."

• One manager told a recruiter during an evaluation: "The qualitative has to align with whatever is on the first page (the quantitative numbers). . . . We have got to make the qualitative portion of your review match where you fit on your numbers."

Some recruiters indicated further that it was widely known that supervisors would simply adjust the "qualitative factors" to match the numbers. Recruiters overwhelmingly confirmed that the number of enrollments was the "bottom line." Recruiters stated that even though the number of enrollments was the actual basis of their salary, management was always careful not to put this in writing due to awareness that the Department prohibited incentive compensation based on enrollments. Recruiters who asked their managers to put the enrollment requirements in writing were refused.

One director, who had also been an enrollment manager, and was hired in the early 1990s, recalls that when she was hired, the matrix included the number of enrollments. With the old matrix, evaluations were very straightforward. The number of enrollments established the salary. In the late 1990s, however, the Corporate Director of Enrollment issued a directive to managers explaining that UOP could no longer directly put the number of enrollments on the matrix because to compensate recruiters based only on the number of students enrolled was illegal. As a result, UOP introduced "qualitative" factors into the matrix. In addition, UOP began maintaining two files on recruiters; one was the "activity" file, kept at the local campus; the second was the Human Resources/official personnel file, kept in headquarters, in Phoenix. The "official" human resources file contains only qualitative ratings. The quantitative data is kept in the activity file and forms the basis for salary evaluations.

[. . . .]

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[. . . .]

5.3.1 Pressure to Enroll Unqualified Students

Recruiters frequently mentioned their concern for student customers for whom UOP was not a good educational option, such as customers who, because of their family and financial situation, could not reasonably expect to complete a degree program at UOP and would be better served by other alternatives, such as a community college. UOP managers chastise recruiters who suggest anything other than UOP. UOP makes it very clear that recruiters are to do whatever it takes to get the student to enroll. Some managers told recruiters that if a student drops after the first five-week course, it should not be their concern, because by then, the recruiter and the manager will have received the enrollment credit.

Recruiters at both On Ground and On Line stated that they are pressured by management to enroll students who are not qualified. They indicated that managers chastise them for failing to pressure students into enrolling or staying in their first class, in spite of the lack of financial resources. UOP makes it clear that recruiters are expected to find a way to "overcome objections," e.g., if the problem was insufficient funds, encourage Title IV funding. If the objection was insufficient Title IV funds, pressure the student to seek a private loan.

Some recruiters who were also UOP students expressed concern that UOP kept students in class even though they were unable to perform. Some mentioned that UOP pressured instructors to pass all students, regardless of performance.

5.3.2 Focus on Obtaining Credit for Enrollment, Not on Completing Education

From its Monthly Commissionable Sales Reports, to its Admission Counselor Policy Guide, to its repeated reminders from managers, UOP reinforces to recruiters that UOP evaluates and pays them solely on the basis of how many students they enroll. Recruiters recounted of how they are careful to follow students until they met the criteria that resulted in credit to the recruiter's enrollment account for purposes of salary; specifically, that the student must attend three nights of the first five-week course of a bachelors' program or, for graduate students, attend two nights of a graduate class and be scheduled to attend a second class. After the student has met these criteria, the managers do not want the recruiters to spend time with a student. UOP requires them to pursue new enrollments, not follow those who have already completed one course.

Many recruiters thought that this system of selling the student and then dropping them once the enrollment credit is earned, underscores UOP's lack of concern for its students. Those who had been at UOP for several years all stressed that at one time, UOP had been more student and education oriented. After its Wall Street debut, however, UOP eliminated its focus on students and became increasingly aggressive in its obsession with numbers: new enrollments, meeting Wall Street expectations, maintaining profit margin. This is especially acute in the case of UOP On Line, ...

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[. . . .]

5.4 Conclusion: UOP Violated Incentive Compensation Prohibitions And Breached Its Fiduciary Duty

5.4.1 Deceptive Practices to Mislead Department

The sales philosophy and practice at UOP is designed around evasion and relies upon euphemisms to avoid detection by the Department. UOP systemically established terminology and procedures to hide the fact that UOP pays distinct and significant financial incentives solely based on recruiters' success in securing enrollments. . . .

[. . . .]

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[. . . .]

At the On Line Campus, UOP generally posts large banners ranking the recruiters by the number of enrollments cleared. UOP removed these banners shortly before the arrival of the reviewers for interviews of On Line personnel. The UOP spreadsheets posted on recruiters' computer desktops that showed the salary/enrollment "goals" were also removed the day of the reviewers' arrival at the On Line Campus.

The actions of UOP and the system it has established cultivates and maintains a corporate culture in defiance of UOP's fiduciary duty. UOP has created an environment that pits the strong motivation of individual gain against its fiduciary duty to the Department. It is one that flaunts the Department's regulations and the prohibition against incentive compensation based on enrollments.

[. . . .]

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[. . . .]

Applying this guidance to UOP's system of recruiter salary compensation, we find that UOP:

- hires its recruiters with the promise of lucrative compensation for success in securing enrollments;
- maintains a recruiter evaluation and salary system that provides incentive payments based both directly and indirectly on success in securing enrollments;
- provides substantial incentives to its staff to recruit unqualified students and students who cannot benefit from the training offered;
- systematically and intentionally operates in a duplicitous manner so as to violate the Department's prohibition against incentive compensation while evading detection.

Accordingly, UOP is in direct violation of §487(a)(20) of the Higher Education Act.

Supreme Court, U.S.
FILED
APR 9 - 2007
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No. 06-1006

IN THE

Supreme Court of the United States

UNIVERSITY OF PHOENIX,

Petitioner,

v.

UNITED STATES EX REL. MARY HENDOW AND JULIE ALBERTSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Mary Hendow and Julie Albertson respectfully submit this supplemental brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

I. CERTIORARI SHOULD BE DENIED IN THIS INTERLOCUTORY APPEAL BECAUSE PETITIONER JUST FILED A POTENTIALLY DISPOSITIVE MOTION TO DISMISS IN THE UNDERLYING DISTRICT COURT ACTION

On March 22, 2007, after Respondents forwarded their Brief in Opposition to the printer for filing with this Court, Petitioner University of Phoenix filed and served a Fed. R. Civ. P. 12(b)(1) motion to *dismiss all claims* in the underlying action in the Eastern District of California, Case No. CV-03-0457 GEB DAD. Resp. Supp. App. 2a, 4a.

Respondents intend to oppose the motion to dismiss with Ninth Circuit and other appellate authority to the contrary of Petitioner's motion to dismiss. Should the district court grant the motion, however, such decision would dispose of the entire case and render moot Petitioner's request for certiorari.

II. PETITIONER REPRESENTS TO THIS COURT DAMAGES ASSESSMENTS THAT ARE DRAMATICALLY DIFFERENT FROM THOSE PRESENTED IN PETITIONER'S MOTION TO DISMISS IN THE DISTRICT COURT, RENDERING MOOT ONE OF PETITIONER'S STATED GROUNDS FOR GRANTING CERTIORARI

Petitioner represents to this Court that certiorari should be granted on the ground Petitioner is at risk of paying "more than a billion dollars in damages" and Petitioner "will face enormous

pressure to settle the case in order to avoid the uncertainties of going to trial." Reply 9.

Simultaneously, in its motion to dismiss, Petitioner represents to the district court "[w]hile this case was on appeal from the Court's order dismissing Relators' Second Amended Complaint, the Government administratively pursued and settled the allegations asserted in this *qui tam* action against UOP for $9.8 million." Resp. Supp. App. 5a.

Given that the district court ruling on the subject motion may dispose of Petitioner's contradictory contentions about its damages exposure by dismissing the case, such is all the more reason not to grant interlocutory appeal.

CONCLUSION

For the foregoing additional reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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April 9, 2007

SUPPLEMENTAL APPENDIX

Appendix A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.* MARY HENDOW and JULIE ALBERTSON, Plaintiffs,

vs.

UNIVERSITY OF PHOENIX and DOES 1-500, Inclusive, Defendants.

Case No. CIV. S-03-0457 GEB DAD

MINUTE ORDER: The pretrial scheduling conference, currently set for 4/23/07 is rescheduled for 8/13/07 at 9:00. A joint status report is to be filed fourteen days prior to the hearing. The motion to dismiss, currently scheduled for 4/30/07, is reset for 6/11/07 at 9:00 a.m. Ordered by Judge Garland E. Burrell Jr. on 4/2/07. (Furstenau, S)

Appendix B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.* MARY HENDOW and JULIE ALBERTSON, Plaintiffs,

vs.

UNIVERSITY OF PHOENIX and DOES 1-500, Inclusive, Defendants.

Case No. CIV. S-03-0457 GEB DAD

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS RELATORS' SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1)

[Notice of Motion and Motion, Request For Judicial Notice, Declaration of Robert T. Collins, and Appendix of Unpublished Authorities filed concurrently herewith]

Judge: The Honorable Garland E. Burrell

Place: Courtroom 10

Date: April 30, 2007

Time: 9:00 a.m.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The University of Phoenix ("UOP") brings this Motion because it is no longer a proper defendant in this False Claims Act ("FCA") case. While this case was on appeal from the Court's order dismissing Relators' Second Amended Complaint, the Government administratively pursued and settled the allegations asserted in this *qui tam* action against UOP for $9.8 million. The Government therefore pursued an "alternate remedy" to this action within the meaning of the FCA, 31 U.S.C. § 3730(c)(5). Consequently, the Government's claims against UOP are now barred as moot, and Relators no longer have standing to assert claims against UOP on the Government's behalf. All that remains is for a court to determine how much, if any, Relators are entitled to of the $9.8 million that UOP has already paid to the Government as a result of Relators' allegations.

[. . . .]

Appendix C

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 30, 2007, at 9:00 a.m., or as soon thereafter as the matter may be heard at the United States District Court, located at 501 I Street, Sacramento, California 95814, in Courtroom 10, the Honorable Garland E. Burrell, Jr. presiding, defendant the University of Phoenix ("UOP") will move, and hereby does move the Court, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, to dismiss all claims asserted by relators Mary Hendow and Julie Albertson ("Relators") against UOP on the grounds that this case is moot and Relators no longer have standing under Article III of the United States Constitution.

No. 06-1006

IN THE

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v.

UNITED STATES EX REL. MARY HENDOW AND JULIE ALBERTSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

SUPPLEMENTAL BRIEF FOR PETITIONER

Respondents' eleventh-hour arguments in their supplemental brief do nothing to diminish the cert-worthiness of this case.

Respondents' contention that certiorari is unwarranted because University of Phoenix, Inc. ("UOP") has filed a motion to dismiss in the district court is both legally and factually unsound. As established in UOP's reply brief, this Court regularly grants review of cases that are in an interlocutory posture. Reply Br. 10. There is often a risk of mootness in such cases due to the ongoing lower-court proceedings. Respondents are thus essentially arguing that this Court should only review decisions that represent final judgments—which clearly is not this Court's practice. *Id.* Moreover, the hearing on UOP's motion to dismiss is not scheduled to take place before June 11, 2007 (Pet. Supp. App. 1a), which ensures that the disposition of that motion will not moot this Court's consideration of the petition for certiorari.

Respondents' suggestion—that this Court should disregard the fact that they are seeking more than a billion dollars in damages in this case—is inappropriate material for a supplemental brief because it does not concern "new cases, new legislation, or other intervening material not available at the time of" respondents' opposition brief. S. CT. R. 15.8. There was no impediment to respondents' raising that contention in their opposition brief. The settlement agreement between the Department of Education and UOP, which required UOP to make a $9.8 million payment, does not alter the fact that respondents are seeking more than a billion dollars in damages from UOP in this case and that, on that basis alone, this case is eminently worthy of this Court's consideration. *See Fid. Fed. Bank & Trust v. Kehoe*, 126 S. Ct. 1612, 1612 (2006) (Scalia, J., concurring in denial of certiorari). It does demonstrate, however, that respondents' requested False Claims Act damages are wholly out of propor-

tion to the alleged regulatory violations on which they would be premised.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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April 13, 2007

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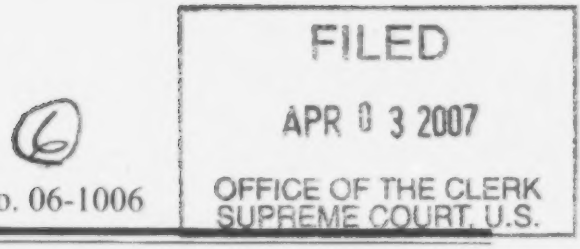

No. 06-1006

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Petitioner,

v.

UNITED STATES EX REL. MARY HENDOW AND JULIE ALBERTSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF FOR PETITIONER

This case is exceptionally important to the thousands of companies that regularly do business with the federal government and that face staggering new False Claims Act ("FCA") liability—and inordinate pressure to settle legally doubtful FCA claims—under the Ninth Circuit's expansive interpretation of the statute. As demonstrated by the *amicus* briefs filed by representatives of the education, defense, and health-care industries, the Ninth Circuit's decision dramatically lowers the standard for pleading a cause of action under the FCA, exposes government contractors to potentially bankrupting FCA liability for a knowing violation of *any* of the countless regulations that govern participation in federal programs, and vastly amplifies the settlement pressure on FCA defendants. In this case alone, respondents are seeking more than a *billion* dollars in damages for alleged regulatory violations already subject to remedial regimes other than the FCA—and this is by no means an isolated example of plaintiffs invoking the FCA to secure recoveries wholly disproportionate to the alleged regulatory violations on which they are premised. Nothing in respondents' brief successfully calls the significance of this case into question.

Moreover, nothing in respondents' brief obscures the circuits' extensive split regarding the elements of an FCA cause of action. Indeed, the decision below exacerbates the lower courts' preexisting confusion regarding the requirements for pleading false certification and promissory fraud claims under the FCA, and fosters intolerable uncertainty for businesses that contract with the federal government.

This Court's review is warranted to bring much-needed clarity to this area of the law and to ensure that the FCA is not transformed into a tool for extracting extortionate and unjustified settlements from FCA defendants unable to bear the risks of going to trial.

A. The Decision Below Presents Issues Of Exceptional Importance To All Companies That Do Business With The Federal Government.

Contrary to respondents' assertion, the Ninth Circuit's holding is anything but "narrow." Opp. 2. Its far-reaching implications extend to all companies that contract with the federal government, exposing them to new and unforeseen FCA liability for purely *regulatory* noncompliance previously addressed through more nuanced—and far less punitive—remedial regimes.

Under the Ninth Circuit's holding, University of Phoenix, Inc. ("UOP") and other educational institutions are confronted with the specter of multibillion-dollar judgments for knowingly violating any of the hundreds of threshold eligibility requirements that govern participation in the Title IV financial aid program. *See* 34 C.F.R. pt. 668 (setting forth 162 pages of regulations governing participation in the Title IV program); Br. of the Career Coll. Ass'n 6-8 (listing examples of regulatory requirements that could support an FCA claim under the Ninth Circuit's reasoning). Noncompliance with program eligibility requirements is properly addressed, however, under the Higher Education Act itself, which provides for the assessment of financial penalties and other remedial measures against noncompliant institutions (*see, e.g.*, 20 U.S.C. § 1094(c)(3)(B)(i)), rather than through the "blunt instrument" of the False Claims Act's potentially devastating treble-damages and civil penalty provisions. *Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001).

The Ninth Circuit's decision has similarly alarming implications for government contractors in the defense and health-care industries, who, like UOP, must comply with extensive eligibility requirements to do business with the federal government and who now face the prospect of billion-dollar FCA penalties premised on any allegation that they

knowingly violated these requirements. *See* Br. of Nat'l Def. Indus. Ass'n 14; Br. of the Am. Health Care Ass'n et al. 9.

Respondents' attempt (Opp. 13-14) to cabin the scope of the Ninth Circuit's decision by emphasizing that it applies only to *knowing* regulatory violations, and to the requirements for surviving a motion to dismiss, overlooks the realities of the litigation process and the hydraulic settlement pressure exerted on FCA defendants. A requirement that a relator allege a knowing regulatory violation to withstand a motion to dismiss affords the defendant absolutely no protection against unsubstantiated FCA claims, because a relator can draft a complaint without difficulty that pleads a knowing violation, and need not produce evidence to support that allegation to survive a motion to dismiss. *See* 13 Op. Off. Legal Counsel 207, 220 (1989) ("Relators who have no interest in the smooth execution of the Government's work have a strong dollar stake in alleging fraud whether or not it exists.").

Once the low motion-to-dismiss threshold has been passed, the settlement pressure on FCA defendants facing claims for hundreds of millions of dollars in damages becomes overwhelming. Rather than risk a financially crippling judgment, the vast majority of FCA defendants are compelled to enter into settlement agreements, regardless of the accuracy of the relators' allegations. The requirement that an FCA relator plead a knowing regulatory violation is therefore no barrier at all to the relator's recovery of an extortionate multimillion-dollar settlement from a defendant unable to withstand the risks and uncertainties of trial. Indeed, notwithstanding respondents' blithe assertion to the contrary (Opp. 14), these potential FCA liabilities may compel some companies to forgo government contracting opportunities altogether. *See* Br. of Nat'l Def. Indus. Ass'n 18 (if the Ninth Circuit's decision stands, "[c]ompanies with important commercial technology needed by the military will choose not to enter government contracting").

B. The Circuits Are Deeply Divided Regarding The Requirements For Pleading An FCA Cause Of Action.

Respondents' attempt to reconcile the decision below with other circuits' interpretations of the FCA is also unsuccessful. Indeed, even before the decision below, the circuits were already at odds regarding the parameters of the false certification and promissory fraud theories of FCA liability. The decision in this case exacerbates the lower courts' confusion and underscores the urgent need for this Court's review.

1. The Ninth Circuit held that an FCA false certification claim need not be based on an alleged misrepresentation regarding a regulatory requirement on which government payment is conditioned, but can instead be premised on an alleged misrepresentation in connection with a threshold condition of program eligibility, such as the restriction on incentive compensation at issue here. This expansion of the FCA's scope is obviously very significant on a practical level; moreover, it conflicts with decisions from three other circuits limiting the false certification theory to conditions of government payment, including a Fifth Circuit decision dismissing a virtually identical FCA claim premised on alleged violations of the restriction on incentive compensation. *See Mikes*, 274 F.3d at 699; *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 793 (4th Cir. 1999); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997); *United States ex rel. Graves v. ITT Educ. Servs., Inc.*, 111 F. App'x 296, 297 (5th Cir. 2004), *cert. denied*, 544 U.S. 978 (2005). *But see United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005) (rejecting the distinction between conditions of payment and conditions of eligibility), *cert. denied*, 126

S. Ct. 1786 (2006).[1] Accordingly, in the Second, Fourth, and Fifth Circuits, respondents' suit would have been dismissed because it is premised on alleged false representations concerning a threshold requirement governing eligibility to participate in the federal financial aid program, rather than on a condition of receiving financial aid payments once initial program eligibility has been established. *See* 20 U.S.C. § 1094(a) (a program participation agreement "condition[s] the initial and continuing *eligibility* of an institution to participate in a program upon compliance" with its terms, including the restriction on incentive compensation) (emphasis added); Pet. App. 26a.[2]

Respondents do not contest the fact that courts outside of the Ninth Circuit have drawn a legal distinction between conditions of program eligibility and conditions of payment, and have restricted the false certification theory to alleged knowing violations of payment conditions. Opp. 18. They instead argue that the "distinction . . . is not implicated in this case" because, according to respondents, the Ninth Circuit held that the restriction on incentive compensation *is* a condition of payment. *Id.* (emphasis omitted).

The Ninth Circuit, however, correctly recognized that "compliance with the incentive compensation ban is a necessary condition of continued *eligibility* and *participation*" in

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[1] Respondents' suggestion (Opp. 19. n.4) that the Second Circuit's holding in *Mikes* is limited to the Medicare context is incorrect because the court's reasoning is not based on any considerations peculiar to the Medicare setting. It rests instead upon the Second Circuit's unequivocal determination that the false certification theory of FCA liability is applicable only "where a party certifies compliance with a statute or regulation as a condition to governmental payment." *Mikes*, 274 F.3d at 697.

[2] Indeed, respondents seem to agree that, properly conceived, the restriction on incentive compensation is a threshold condition of program eligibility. *See* Opp. 3 ("to become eligible to receive Title IV funds, . . . a school must first enter into a Program Participation Agreement").

the Title IV program. Pet. App. 16a (emphases added). Despite this recognition—and the Department of Education's own conclusion that violations of the restriction on incentive compensation do not cause the government monetary loss (*id.* at 52a)—the Ninth Circuit reinstated respondents' FCA claim because it reasoned that UOP would never have received financial aid payments from the federal government if it had not initially attested that it met the Title IV program's threshold eligibility requirements. *Id.* at 16a-17a. By treating conditions of eligibility as legally indistinguishable from conditions of payment, the Ninth Circuit nullified the legal distinction between these two categories of requirements, and vastly increased the range of regulatory violations on which FCA causes of action—seeking civil penalties of up to $11,000 per claim and treble damages—can be premised.

Respondents see nothing wrong with this outcome. According to respondents, the Ninth Circuit's "decision reflects the common sense proposition that the False Claims Act prohibits lying to obtain government benefits in *all* its forms." Opp. 12 (emphasis added). But the essentially boundless interpretation of the FCA endorsed by the Ninth Circuit conflicts with the statute's plain language, which proscribes the use of fraud to "get a . . . claim paid" (31 U.S.C. § 3729(a)(2)), not to obtain threshold program eligibility. *Cf. Rockwell Int'l Corp. v. United States*, No. 05-1272, 549 U.S. ___ (Mar. 27, 2007) (slip op. 15). Respondents' characterization of the FCA is also flatly inconsistent with this Court's recognition that the statute "was not designed to reach every kind of fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958).[3]

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[3] To the extent that, as urged by respondents (Opp. 15), the Court gave contrary indications regarding the FCA's scope in *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968), that potential inconsistency merely underscores the need for this Court to provide authoritative guidance concerning the statute's parameters.

The language of the FCA—confirmed by this Court's prior interpretations of the statute—demonstrates that Congress did not intend for the FCA to be an all-purpose remedy for every type of alleged fraud on the government. By extending the FCA's reach beyond its textual bounds, the Ninth Circuit has displaced those statutory and regulatory mechanisms that are designed to address misrepresentations relating to federal program eligibility requirements. *See, e.g.*, 18 U.S.C. § 1001; 20 U.S.C. § 1094(c)(3)(B)(i).[4]

2. The decision below further extends the FCA's reach—and exacerbates lower-court confusion—by deeming an alleged "fraudulent course of conduct" sufficient to state a false certification claim. Pet. App. 13a. Thus, unlike in the Second and Third Circuits, where an FCA plaintiff must identify a false statement of statutory or regulatory compliance to plead a false certification claim (*see Mikes*, 274 F.3d at 696; *United States ex rel. Quinn v. OmniCare Inc.*, 382 F.3d 432, 441 (3d Cir. 2004)), a plaintiff in the Ninth Circuit need only allege that the defendant engaged in conduct that violated a statutory or regulatory requirement to survive a motion to dismiss. *But see Harrison*, 176 F.3d at 788 (agreeing with the Ninth Circuit).

Respondents attempt to reconcile the Ninth Circuit's decision with other circuits' interpretations of the false certification theory by suggesting that the Ninth Circuit was con-

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[4] Respondents point to a passage from the legislative history of the 1986 FCA amendments that suggests that the statute imposes liability on claimants "'ineligible to participate in the [federal payment] program.'" Opp. 15 (quoting S. Rep. No. 345, 99th Cong., 2d Sess., at 9 (1986)). In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), however, this Court rejected reliance on that same congressional report because the discussion referenced in *Stevens*, and relied upon by respondents, merely purports to summarize the FCA's scope at the time Congress undertook the 1986 amendments, not to describe the effect of the amendments themselves. *Id.* at 783 n.12.

struing only the promissory fraud theory—not the false certification theory—when referring to a "fraudulent course of conduct." Opp. 22. But the unambiguous language of the Ninth Circuit's opinion conclusively rebuts that assertion. *See* Pet. App. 13a ("under *either* the false certification theory *or* the promissory fraud theory, the essential elements of False Claims Act liability remain the same: (1) a false statement or fraudulent course of conduct") (emphases added). The Ninth Circuit's unequivocal language leaves no doubt that, in conflict with the Second and Third Circuits, it considers a fraudulent course of conduct sufficient to state a false certification claim.[5]

3. The decision below also rejects the requirements that other circuits have imposed on pleading promissory fraud under the FCA. Whereas the Fifth and D.C. Circuits require that plaintiffs pursuing a promissory fraud claim allege "prompt[]" and "substantial[]" noncompliance with a promise made to obtain program eligibility (*United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 386 (5th Cir. 2003); *see also United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1329-30 (D.C. Cir. 2005)), the Ninth Circuit did not require respondents to allege that UOP promptly failed to comply with the

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[5] Respondents further attempt to explain away the Ninth Circuit's "fraudulent course of conduct" language by arguing that the court considered only the express—and not the implied—false certification theory. Opp. 22. That argument only highlights the extent to which the Ninth Circuit expanded the scope of the express false certification theory. By holding that a fraudulent course of conduct is sufficient to plead an express false certification claim, the Ninth Circuit eviscerated the distinction between the well-established express false certification theory and the often-criticized implied false certification theory (*Harrison*, 176 F.3d at 786 n.8), which premises FCA liability on the questionable proposition that a claimant impliedly certifies regulatory compliance whenever it submits a claim for payment to the government (*see Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 532 (10th Cir. 2000)).

restriction on incentive compensation or that UOP's conduct was substantially noncompliant with that requirement. None of the conclusory allegations recited in respondents' brief can alter the erroneous pleading standard endorsed by the Ninth Circuit or satisfy the higher threshold applied in the Fifth and D.C. Circuits. Opp. 25.[6]

C. This Case Is An Excellent Vehicle For This Court To Clarify The FCA's Scope.

This case presents an ideal (and rare) opportunity for this Court to clarify comprehensively the parameters of the false certification and promissory fraud theories of FCA liability.

Respondents nevertheless assert that this Court should deny certiorari because a final judgment has not yet been entered against UOP. Opp. 28. Because respondents are seeking more than a billion dollars in damages, however, it is unlikely that this Court will ever have the opportunity to review a final judgment in this case. If this Court does not grant review at this time, UOP—despite its firm conviction that respondents' allegations are unfounded, self-interested, and outrageous—will face enormous pressure to settle the case in order to avoid the uncertainties of going to trial.[7]

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[6] Respondents fault UOP's reliance on *Bettis* because the case was decided on summary judgment. Opp. 24. But in considering the evidentiary showing that must be made to survive summary judgment, the D.C. Circuit necessarily delineated the factual allegations that a plaintiff must plead to overcome a motion to dismiss.

[7] Respondents contend that the Department of Education's review of UOP's recruiting policies substantiated the allegations in their complaint. Opp. 7. But the initial report quoted by respondents relied heavily on respondents' own self-interested statements. Notably, the settlement that terminated the program review proceedings did not require UOP to admit any liability, to repay any of the financial aid received by its students, or to modify any of its recruiting policies—a result that represents an implicit rejection of respondents' highly colored allegations.

For this and other reasons, this Court frequently grants review of cases that are in an interlocutory posture. *See Credit Suisse Sec. (USA) LLC v. Billing*, No. 05-1157 (cert. granted Dec. 7, 2006); *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Norfolk S. Ry. v. Kirby*, 543 U.S. 14 (2004). Review is warranted here because it is unlikely that the Court will have another opportunity to consider this case and because the important legal issues raised in the petition for a writ of certiorari are cleanly presented on an undisputed factual record.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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April 3, 2007

(4)

No. 06-1006

FILED
MAR 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

UNIVERSITY OF PHOENIX,

Petitioner,

v.

UNITED STATES EX REL. MARY HENDOW AND JULIE ALBERTSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN HEALTH CARE ASSOCIATION AND THE NATIONAL ASSOCIATION FOR THE SUPPORT OF LONG TERM CARE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The American Health Care Association ("AHCA") is one of the nation's leading long-term care organizations. AHCA is the national representative of more than 10,000 non-profit and proprietary facilities dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly and disabled citizens who live in nursing facilities, assisted living residences, subacute centers, and homes for persons with mental retardation and developmental disabilities. The National Association for the Support of Long Term Care ("NASL") represents providers of ancillary products and services to the long-term care industry. Member companies provide therapy services, diagnostic services, software systems, and medical equipment and supplies to long-term care facilities. One way in which AHCA and NASL promote the interests of their members is by participating as *amici curiae* in cases with important and far-ranging consequences for their members—including cases arising under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. *See, e.g.*, Brief *Amici Curiae* for AHCA *et al.* in Support of Petitioners, *Rockwell Int'l Corp. v. United States ex rel. Stone*, No. 05-1272 (U.S. Oct. 26, 2006).

The question presented in the University of Phoenix's ("UOP") petition is of tremendous importance to *amici's* members. The federal government funds in full or in part a substantial percentage of the health services provided by *amici's* members, including under the Medicare and Medicaid statutes and accompanying regulations. These statutes and regulations have been described by this Court as "Byzantine" texts "among

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief. Petitioner has filed a letter with the Clerk granting blanket consent to any party wishing to file a brief in support of either petitioner or respondents, and respondents' written consent to the filing of this brief has been filed with the Clerk.

the most intricate ever drafted by Congress." *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981); *see also Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 13 (1999) (describing Medicare as a "massive, complex health and safety program . . . embodied in hundreds of pages of statutes and thousands of pages of often interrelated regulations").

Amici's members daily navigate the "morass of bureaucratic complexity" of the federal health care programs, *Herweg v. Ray*, 455 U.S. 265, 279 (1982) (Burger, C.J., dissenting), submitting thousands of claims a day to the Medicare and Medicaid programs. If providers cross one of the lines in these programs' "impenetrable" texts, *Rehabilitation Ass'n of Va., Inc. v. Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994), they may, if the decision below stands, expose themselves to potential liability under the FCA, which provides for treble damages and penalties of $5,500-$11,000 for every "false or fraudulent" claim knowingly presented to the government, 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(9). The FCA's *qui tam* provisions authorizing private citizens to sue on the government's behalf augment the statute's powerful arsenal of remedies—and also heighten the risk that violation of a rule will be elevated to an allegation of fraud. *See* 31 U.S.C. § 3730(b); *see also United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943) (noting that *qui tam* relators often act "under the strong stimulus of personal ill will or the hope of gain'") (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885)). *Amici* therefore have a strong interest in seeing that their members can predict with reasonably certainty how the FCA will be applied.

SUMMARY OF ARGUMENT

The statutory language at the heart of this case—"false or fraudulent"—was enacted by Congress in 1863. Since that time, the exponential growth in the federal government's role in national economic life (e.g., as a heath insurer and guarantor of college loans) has resulted in a fundamental restructuring of the relationship between the federal government and the majority

of private entities with whom it contracts. Administrative agencies now maintain comprehensive systems to police compliance with the thousands of pages of statutes, regulations and other guidance defining private entities' eligibility to provide government benefits, often using specified remedies that allow contract payments to continue during periods of noncompliance.

Lower federal courts have struggled with how to apply the FCA in light of these changed circumstances. As evidence of that fact, the Ninth Circuit's decision below adopted a sweeping interpretation of "false or fraudulent" that nullified the Department of Education's discretionary decision to treat UOP's alleged statutory and regulatory infractions as an administrative enforcement matter, not as fraud upon the government. In so doing, the Ninth Circuit relied upon language in a 1986 Senate report whose description of the FCA this Court recently found to be of no value for determining the meaning of words enacted by the 1863 Congress. The Court should grant UOP's petition in order to provide guidance to the lower courts on the proper boundaries of the FCA as applied to heavily regulated industries.

ARGUMENT

REVIEW SHOULD BE GRANTED BECAUSE LOWER FEDERAL COURTS AND GOVERNMENT CONTRACTORS NEED GUIDANCE ON THE PROPER APPLICATION OF THE FALSE CLAIMS ACT TO THE MODERN ADMINISTRATIVE STATE

A. Historical Origins of the False Claims Act

The FCA is a Civil War era statute that, in those provisions relevant to this case, has remained substantively unchanged since its original enactment in 1863. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 ("1863 Act"). The statute was adopted "following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department." *United States v. McNinch*, 356 U.S. 595, 599 (1958). To combat military

contracting abuses, Congress created a damages cause of action that could be brought directly by the United States or on its behalf by private persons. *See* 1863 Act § 4.

The original FCA authorized suit against "any person . . . who shall make or cause to be made . . . any claim upon or against the Government of the Unites States . . . knowing such claim to be *false, fictitious, or fraudulent* . . . ." *Id.* § 1 (emphasis added); *see also id.* § 3 (making section 1 applicable to non-military members). It also authorized suit against any person "who shall, for the purpose of obtaining . . . the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any *false or fraudulent* statement . . .." *Id.* § 1 (emphasis added).

Congress recodified the FCA in 1982 and at the same time eliminated the word "fictitious" from the 1863 prohibition against "false, fictitious, or fraudulent" claims. *See* Act of Sept. 13, 1982, Pub. L. No. 97-258, § 1, 96 Stat. 877, 978. However, this minor textual change was designed only to "eliminate unnecessary words" and provide "consistency," rather than to enact any substantive change. H.R. Rep. No. 97-651, at 143 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 2037. The FCA was amended again in 1986. *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 ("1986 Amendments"). Importantly, the 1986 Congress did not define, amend or otherwise alter the words "false or fraudulent."

The current version of the FCA allows suit against any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a *false or fraudulent* claim for payment or approval." 31 U.S.C. § 3729(a)(1) (emphasis added). A second provision allows suit against any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a *false or fraudulent* claim paid or approved by the Government."

Id. § 3729(a)(2) (emphasis added). Congress has never defined the phrase "false or fraudulent."

B. The Civil War Era False Claims Act Was Not Designed To Apply to Contract Claims Made Upon the Modern Administrative State

At the time of its enactment in 1863, the majority of federal government contracts involved services and products to be delivered directly to the government on its own account. *See generally* James F. Nagle, *A History of Government Contracting* 181-220 (1st ed. 1992) (describing federal contracting during Civil War period). Moreover, the types of governmental benefit, entitlement and welfare programs at the heart of this case were not only unknown in 1863, programs of their type were generally believed to be no business of the federal government. *See* Lawrence M. Friedman, *A History of American Law* 439 (2d ed. 1985). Federal programs providing—and paying for—governmental benefits delivered by private sector entities simply did not exist at the time the FCA was adopted, nor did the federal government act in the myriad regulatory roles that it does today.

Likewise, the sorts of pervasive federal regulatory and oversight systems such as that at issue in this case—complete with their own systems to assess regulatory compliance, processes to adjudicate regulatory violations, standards to evaluate the significance of such violations, and discretion to decide whether a remedy or sanction is appropriate—were unknown to the Congress that adopted the FCA. *Cf. FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (noting that the "rise of administrative bodies probably has been the most significant legal trend of the last century" during which time agencies have become a "veritable fourth branch of the Government"). At the very least, the Congress that adopted the FCA would have found thoroughly novel the concept that FCA liability could be predicated on violation of a regulation adopted by a federal administrative agency that prescribes eligibility

standards for private entities wishing to provide government benefits at federal expense.

When compared to the time that the FCA was adopted, it is plain that the exponential growth in the importance of administrative agencies—to whom Congress has delegated the management and oversight of large federal benefit and social welfare programs, and the decision by Congress that government benefits created by those programs should be delivered by the private sector—has resulted in a novel and fundamental restructuring of the relationship between the federal government and the majority of entities with whom it contracts. With this growth in administrative authority has come a concomitant increase in the federal government's "economic role in national life . . . and with it the opportunities for those receiving government funds" to violate one or more of the innumerable regulations governing entitlement to provide government benefits. 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 1.01[B], at 1-11 (3d ed. 2005). Whether violation of such regulations makes a subsequent claim for payment "false or fraudulent" within the meaning of the FCA, however, is a question that never would have occurred to the framers of the statute.

The difficulty of reconciling the Civil War era FCA to the modern administrative state is exacerbated—and the need for this Court's guidance made manifest—because the various administrative agencies have been delegated the power to adopt substantive compliance standards; the discretion to assess the degree and level of a contracting entity's compliance with complex statutory and regulatory standards; the unreviewable discretion to determine what, if any, action to take in the face of noncompliance; and the permission to use remedial measures for non-compliance while allowing contract payments to continue. Indeed, in cases not involving the FCA, this Court has recognized that the existence of detailed and comprehensive regulatory and enforcement schemes indicates congressional

intent to preclude enforcement of the statute by anyone other than the agency to whom Congress has delegated enforcement discretion. *See, e.g.*, *Blessing v. Freestone*, 520 U.S. 329, 341 (1997); *Montana-Dakota Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951). If the FCA is an exception to that long-settled rule, such exception ought to be announced and rationally explained by this Court, not presumed *sub silentio*.

This case illustrates these points in the most concrete terms. Respondents, private individuals, alleged that UOP, a proprietary university that contracts with the Department of Education to provide services, violated the FCA by knowingly violating a ban on incentive compensation for college recruiters. *See* Pet. App. 3a. However, consistent with its stated policy, *see id.* 52a, the Department of Education exercised its discretion to continue making payments to UOP and to treat the university's alleged violation of the ban on incentive compensation as a regulatory enforcement matter. The agency and the university eventually reached a settlement that "did not require UOP to repay any of the financial aid received by its students, change any of its practices for compensating admissions counselors, or discipline any of its employees." Pet. at 6.

This Court should grant review because this scenario raises at least four important questions in cases such as this one. First, assuming for the sake of argument that a claim for payment can be "false or fraudulent" based on a regulatory violation, is it the province of a court to determine the existence of the predicate regulatory violation when Congress has committed such decisions to agency discretion? Second, because administrative agencies determine the existence of regulatory violations using their own unique and generally informal procedures (or using the procedures and protocols mandated by Congress), is it appropriate for courts to determine the predicate regulatory violation using the Federal Rules of Civil Procedure and the Federal Rules of Evidence? Third, because statutes creating public benefit programs generally confer broad discretion on

the administrative agencies to select a discretionary response to a regulatory violation that, as here, often permits continued payment for services, is it appropriate for a court to apply the remedies provided by the FCA to recoup as damages payments that the enforcement agency has determined were appropriate despite the existence of one or more regulatory violations? Finally, if it is appropriate for courts to allow FCA actions brought directly by the government in the circumstances described above, is it nonetheless inappropriate to permit such actions to be brought by a private relator, who is a complete stranger to the discretion that Congress conferred on an administrative agency to weigh the nature of any violation, consider the competing interests and decide what, if any, enforcement action is appropriate?

No place is the tension inherent in these questions more evident or more prevalent than in the health care context. The federal government is the largest single purchaser of health care in the United States. Two entitlement programs enacted in 1965, Medicare and Medicaid, account for the majority of federal health care spending. *See* Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286. In 2006, the Medicare and Medicaid programs accounted for approximately 21 percent of all federal spending. Cong. Budget Office, *The Budget and Economic Outlook: Fiscal Years 2008 to 2017* 54 (Jan. 2007) (noting that federal Medicare and Medicaid spending totaled $555 billion in 2006).

The vast majority of benefits created by the Medicare and Medicaid programs are provided by private entities, such as the providers represented by *amici*, pursuant to a statutorily mandated contract. The federal regulations governing eligibility for a nursing facility provider agreement include dozens of separate requirements and cover every aspect of care delivery, from facility administration to activities programs and everything in between. The need for this Court's review is illustrated by the implicit tension between the regulatory system

established by Congress and enforced by the Secretary of Health and Human Services ("Secretary"), on the one hand, and the use of the FCA to recover treble damages and penalties for claims that are allegedly "false or fraudulent" because a nursing home provider has violated one or more of the same eligibility standards. This tension arises from: (1) the differing processes used by the Secretary and the courts to determine the existence of a regulatory violation; and (2) the extent of the discretion committed by law to the Secretary to craft a response to any regulatory violation and the range of possible responses, including—as in the case before this Court—continued payment for services notwithstanding the existence of a regulatory violation.

For example, in contrast to the judicial process, the Medicare and Medicaid Acts provide that determinations of compliance with program statutes and regulations must be made in an onsite inspection using prescribed methodologies that bear no relation to the judicial fact-finding process. The inspection, according to the Acts, must be conducted using a survey protocol—including forms, procedures, guidelines and methodologies—that the Secretary has "developed, tested, and validated." 42 U.S.C. §§ 1395i-3(g)(2)(C), 1396r(g)(2)(C). The team of inspectors, known as "surveyors," determines whether the nursing home is in *substantial* compliance with the regulations governing participation in the Medicare and Medicaid programs. *See* 42 C.F.R. §§ 488.26, 488.301. The survey team must include a "multidisciplinary team of professionals," including at least one registered nurse. 42 U.S.C. §§ 1395i-3(g)(2)(E), 1396r(g)(2)(E).

In further contrast to the judicial process, surveyors must use a "case-mix stratified sample of residents" to evaluate "the quality of care furnished, as measured by indicators of medical, nursing, and rehabilitative care, dietary and nutrition surveys, activities and social participation, and sanitation, infection control, and physical environment." *Id.* §§ 1395i-3(g)(2)(A)(ii),

1396r(g)(2)(A)(ii). Surveyors are to "directly observe the actual provision of care and services to residents, and the effects of that care, to assess whether the care provided meets the needs of individual residents." 42 C.F.R. § 488.26(c)(2). Failure to utilize the prescribed protocol renders the results of the inspection invalid. *Id.* § 488.26(c)(4).

If, during a certification inspection, the facility is not in compliance with Medicare and Medicaid program requirements, the Secretary has discretion to impose a variety of remedies on the nursing home. 42 U.S.C. §§ 1395i-3(h)(1), 1396r(h)(1). Some of the sanctions or remedies that may be imposed include termination of a provider's ability to participate in the Medicare and Medicaid programs, denial of payments to the provider, placement of a temporary manager or state monitor in the facility, and civil money penalties up to $10,000 per incident for each day that the violation existed. *Id.* §§ 1395i-3(h)(2), 1396r(h)(2). In order to select the appropriate sanction, surveyors are required to classify deficiency findings by seriousness. 42 C.F.R. § 488.404(b). Seriousness is assessed by evaluating the severity of the deficiency (i.e., the degree of actual and potential harm), in conjunction with the scope of the deficiency (i.e., the degree to which it is pervasive or isolated). *Id.* §§ 488.404(b), 488.404(e)(i)-(iii), 488.410(a). In contrast to the FCA, the selection of an appropriate remedy also must be based on the Secretary's assessment of the "most effective remedy . . . to assure the protection of the well-being of the resident population," 59 Fed. Reg. 56,116, 56,123 (Nov. 10, 1994), as well as the facility's "prior history of noncompliance," 42 C.F.R. § 488.404(c)(2). Indeed, one of the principal purposes of the comprehensive nursing home legislation that Congress passed in 1987 was to expand and confer discretion on the Secretary to continue Medicare and Medicaid payments even where nursing homes had regulatory compliance issues. *See* Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, §§ 4201-4218, 101 Stat. 1330, 1330-160 to 1330-221.

The need for reconciliation of the FCA as applied to the modern administrative state is most starkly demonstrated by the Medicare Act's comprehensive ban on judicial interference with the Secretary's discretion to administer the Medicare program. Specifically, Congress explicitly recognized the vital importance agency discretion would play in the program's proper administration by channeling through the Secretary "any claim arising under" the Medicare Act. 42 U.S.C. § 1395ii (incorporating 42 U.S.C. § 405(h)). In the words of Congress: "No findings of fact or decision of the [Secretary] shall be reviewed by *any* person, tribunal, or governmental agency" except as specifically authorized by Congress. *Id.* § 405(h) (emphasis added). Yet, a claim for payment cannot be false under the FCA unless a court does precisely what this Court has said only the Secretary can do—determine compliance with program standards. *See Illinois Council*, 529 U.S. at 13 (ruling that § 405(h) jurisdictional bar applies irrespective of whether plaintiff challenges agency's action on evidentiary, rule-related, statutory, constitutional or other legal grounds).

C. Lower Courts Have Struggled To Apply the False Claims Act to Contractors Subject to Complex Regulatory, Enforcement and Remedial Programs

The threshold question in many FCA cases—as it is here—is whether the defendant actually presented a "false or fraudulent" claim within the meaning of the FCA. The absence of a statutory definition for the phrase "false or fraudulent," coupled with a lack of definitive guidance from this Court on the subject, has required the lower federal courts to craft various devices for determining how the FCA applies to entities who are subject to complex regulatory, enforcement and remedial programs and, while arguably in violation of one or more program requirements, submit claims for payment.

For example, courts have used various derivatives of the "express false certification" theory whereby the contractor's allegedly false certification of compliance with a federal statute

or regulation renders subsequent claims "false or fraudulent." *See, e.g., United States ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432, 441 (3d Cir. 2004). In recognizing this theory, at least one court has looked to the "causal chain" leading to payment as opposed to the proximity between the time of the alleged false certification and the claim for payment, *see United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005), while others have stated that the false certification must tie directly to the government's decision to pay a claim, *see United States ex rel. Gross v. AIDS Research Alliance-Chicago*, 415 F.3d 601, 605 (7th Cir. 2005); *United States ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 382-83 (5th Cir. 2003); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902-03 (5th Cir. 1997).

In recognizing that only a subset of admittedly false claims should be subject to punishment under the FCA, other courts ask the additional question of whether the certification was in fact "material" to the government's decision to pay the claim. *See, e.g., United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 444 (6th Cir. 2005); *Mikes v. Straus*, 274 F.3d 687, 689 (2d Cir. 2001); *Harrison*, 176 F.3d at 788. However, even those courts that recognize an additional "materiality" requirement disagree as to what standard to apply. *See Medshares*, 400 F.3d at 445 (discussing circuit split between "outcome materiality" and "natural tendency" tests for determining materiality).

Some courts have gone further by imposing liability under the FCA in the absence of an express certification, ruling that the mere act of seeking payment *implicitly* certifies that the contractor has performed in conformance with all statutes and regulations. *See, e.g., Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 532 (10th Cir. 2000); *Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 434 (1994), *aff'd*, 57 F.3d 1084 (Fed.

Cir. 1995) (unpublished table decision). While certain courts have expressed doubt about the validity of the implied false certification theory, *see, e.g.*, *Harrison*, 176 F.3d at 786 n.8, others have attempted to confine its reach by placing strict limits on its use, *see Mikes*, 274 F.3d at 699 (limiting use of implied false certification theory to cases where the "underlying statute or regulation upon which the plaintiff relies *expressly* states" that the contractor must comply in order to get paid).

Lower court difficulties over how to apply the FCA to heavily regulated industries is exemplified by a series of Fifth Circuit decisions in a case involving rent subsidies provided by the Department of Housing and Urban Development ("HUD"). *See United States v. Southland Mgmt. Corp.*, 288 F.3d 665 (5th Cir. 2002) ("*Southland I*"), *rev'd*, 326 F.3d 669 (5th Cir. 2003) (en banc) ("*Southland II*"). In the *Southland* cases, the initial panel majority joined a subsequent en banc decision that held the initial panel's ruling permitting an FCA action was inconsistent with and precluded by the administrative enforcement scheme.

In their monthly requests for rent subsidies, the owners of an apartment building certified, as required by HUD regulation and the owners' agreement with the agency, that their building was maintained in a decent, safe and sanitary condition. *See Southland I*, 288 F.3d at 671. The government initiated an FCA suit against the building's owners after they failed to rectify concerns raised by HUD regarding the building's deteriorating condition, despite the fact that HUD had continued to make rent subsidy payments with full knowledge of the building's condition. *See id.* at 673. A divided panel of the Fifth Circuit initially held that the FCA provided a viable cause of action under these circumstances, saying that "when the government has conditioned payment of a claim upon a claimant's certification of compliance with a provision of a contract entered into pursuant to a regulation, a claimant submits a false claim *as a matter of law* when he or she falsely certifies compliance

with that provision." *Id.* at 679. After rehearing en banc, however, a ten-judge majority—that included the two judges who had initially decided in favor of the government—voted instead that no FCA cause of action arose because no "false" claims had been submitted within the meaning of the FCA. *See Southland II*, 326 F.3d at 675. No "false" claims were submitted, the majority reasoned, because the rent subsidy contract itself specified remedies for dealing with noncompliance and provided that during such time, rent subsidy payments would continue. *See id.* at 676.

The false certification theory has also been applied to the health care industry. For example, in *Mikes*, a former employee of a physician practice filed suit alleging that her former employer sought and received Medicare reimbursement for tests that were improperly performed, thereby making the test results unreliable and the claims for reimbursement "false or fraudulent." *See* 274 F.3d at 693. Confronted with the fact that neither Congress nor this Court has defined "false or fraudulent," the Second Circuit resorted to *Webster's Dictionary* for guidance in an attempt to understand what it was exactly that Congress sought to prohibit in the FCA. *See id.* at 969. The court of appeals eventually concluded that the statute was aimed at claims that attempted to extract money the government otherwise would not have paid. *Id.* The *Mikes* court cautioned, however, that the FCA does "not encompass those instances of regulatory noncompliance that are irrelevant to the government's disbursement decisions." *Id.* at 697. In the words of the Second Circuit, "the [FCA] was not designed for use as a blunt instrument to enforce compliance with all . . . regulations—but rather only those regulations that are a precondition to payment . . . ." *Id.* at 699.

In the leading Ninth Circuit case to have addressed the false certification theory prior to the decision below, the court of appeals rejected a relator's attempt to bootstrap certain regulatory violations into an actionable FCA case. The court in *United*

States ex rel. Hopper v. Anton, 91 F.3d 1261 (9th Cir. 1996), correctly noted that "[i]t is not the case that any breach of contract, or violation of regulations or law, or receipt of money from the government where one is not entitled to receive the money, automatically gives rise to a claim under the FCA." *Id.* at 1265. Recognizing the presence of administrative remedies to address such issues, the *Hopper* court held that in order for a regulatory violation to be actionable under the FCA, compliance with the regulation at issue had to be a *sine qua non* of payment. *Id.* at 1267.

In effectively overruling *Hopper*, the Ninth Circuit's decision below disregarded the important distinction between those requirements that actually affect the government's decision to pay and those that do not. According to the court, "if [it] held that conditions of participation were not conditions of payment, there would be no conditions of payment at all—and thus, an educational institution could flout the law at will." Pet. App. 16a. Such is clearly not the case, as the facts below clearly demonstrate. Rather than allowing UOP to "flout the law at will," the Department of Education conducted an investigation and exercised its discretion to continue making payments to UOP and to treat the school's alleged violation of the ban on incentive compensation as a regulatory enforcement matter. *See* Pet. at 6. By imposing FCA liability under these circumstances, the court of appeals usurped agency discretion by substituting its judgment for that of the Department of Education.[2]

[2] The Ninth Circuit also held that respondents stated a viable cause of action under the so-called "promissory fraud" theory of FCA liability, which holds that liability may attach to each claim submitted under a contract when that contract was originally obtained through false statements or fraudulent conduct. *See* Pet. App. 11a. Despite the requirement to plead fraud with particularity imposed by Rule 9(b) of the Federal Rules of Civil Procedure, the court of appeals did not require respondents to plead specific facts demonstrating the falsity of promises (Cont'd)

D. Lower Courts Need Guidance on How To Apply the False Claims Act in the Context of Heavily Regulated Industries

Most courts that have recognized the false certification theory rest their decisions not on the language of the FCA itself, but on a 1986 Senate committee report said to evidence that the words "false or fraudulent" should be broadly construed to include claims based on statutory and regulatory violations. *See, e.g.*, *Mikes*, 274 F.3d at 697 (citing S. Rep. No. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5265, 5274); *Shaw*, 213 F.3d at 531 (same); *Harrison*, 176 F.3d at 786 (same). For example, the Ninth Circuit below explained that "in amending the False Claims Act in 1986, Congress emphasized that the scope of false or fraudulent claims should be broadly construed . . ." Pet. App. 6a. The court of appeals then quoted the following language from Senate Report 345 in support of that proposition: "[E]ach and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim." *Id.* (quoting S. Rep. No. 99-345, at 9).

However, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court found the exact same Senate report to be of *no* value for discerning the meaning of terms that were not added to the FCA in 1986 or

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(Cont'd)

made *at the time those promises were made*, and instead allowed allegations of regulatory violations to function as "proof" of the promises' falsity. *See id.* at 13a. The Ninth Circuit's decision renders meaningless Rule 9(b)'s pleading requirement, thereby allowing relators to use unspecified allegations to prolong already costly litigation. The decision also conflicts with those from the D.C. and Fifth Circuits. *See United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1329-30 (D.C. Cir. 2005); *Willard*, 336 F.3d at 386.

otherwise amended by the 1986 Congress. In *Stevens*, the Court addressed whether the FCA's use of the word "person" included a state. *See id.* at 780. Ruling that a state was not a "person," the Court flatly rejected language in Senate Report 345 to the contrary. *See id.* at 783 n.12. The passage of Senate Report 345 at issue in *Stevens* purported to describe the law as it then existed at the time Congress enacted the 1986 Amendments. According to the Court, the passage did nothing more than "set[] forth a Senate Committee's (erroneous) understanding of the meaning of the statutory term enacted some 123 years earlier." *Id.* Similarly, that report's sweeping pronouncements on the meaning of "false or fraudulent"—words that originate in the 1863 Act—are of limited value in the instant case.

Putting aside questions regarding the false certification theory's statutory basis, important policy considerations counsel in favor of this Court granting UOP's petition. This Court has not yet determined how the FCA should be applied in the context of heavily regulated government contractors who are confronted with thousands of pages of statutes and agency regulations, manuals and other informal guidance. For example, this Court has not determined how falsity should be defined in the regulatory context, nor has it addressed the effect overzealous private application of the FCA has on programs whose administration is conferred to agency discretion by Congress. *See, e.g., United States ex rel. Windsor v. DynCorp, Inc.*, 895 F. Supp. 844, 852 (E.D. Va. 1995) (finding it impossible to determine whether defendant submitted false claims because to do so would bypass carefully crafted administrative scheme established by Congress).

Indeed, the statutory and regulatory framework within which *amici's* members operate demonstrates that periodic non-compliance by nursing homes is anticipated and built into the administration of the Medicare and Medicaid programs. To illustrate, nursing homes in the nine states comprising the circuit in which this case arose currently average nine regulatory

deficiencies on their annual surveys.[3] The goal of Congress, and the fundamental purpose of the alternative remedies used in the course of administering the Medicare and Medicaid programs, is to create incentives for providers quickly to come back into substantial compliance with program requirements. As the District Court for the Eastern District of California aptly noted:

> To allow FCA suits to proceed where government payment of Medicare claims is not conditioned on perfect regulatory compliance—and where HHS may chose to waive administrative remedies, or impose a less drastic sanction than full denial of payment—would improperly permit *qui tam* plaintiffs to supplant the regulatory discretion granted to HHS under [federal law], essentially turning a discretionary denial of payment remedy into a mandatory penalty for failure to meet Medicare requirements.

United States ex rel. Swan v. Covenant Care, Inc., 279 F. Supp. 2d 1212, 1222 (E.D. Cal. 2002). Judicial determination that claims submitted during periods of noncompliance are "false or fraudulent" not only substitutes judicial fact-finding and discretion for the administrative process and discretion created by the Medicare and Medicaid Acts, it is at odds with the goals of the remedial scheme established by Congress in 1987.

E. Government Contractors Who Operate in Heavily Regulated Industries Need Definitive Judicial Guidance on How the False Claims Act Will Be Applied

The number of FCA lawsuits has grown dramatically over the past two decades. The health care industry has faced the brunt of this upsurge.[4] While the United States government

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[3] *See* Ctrs. for Medicare & Medicaid Servs., *Nursing Home Compare*, http://www.medicare.gov/NHCompare.

[4] *See* GAO, Letter to Hon. F. James Sensenbrenner, Jr., Hon. Chris (Cont'd)

pursues about one-third of those lawsuits, many of the remaining actions are prosecuted by relators alone, who are motivated in large part by the statute's contingent bounty provision and who are not constrained by concerns as to what impact their suits will have on the health care delivery system. *Cf. Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) ("*Qui tam* relators are . . . less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc."). In many cases, relators effectively usurp agency authority and discretion, exalting punishment and pecuniary gain over all other considerations.

The overwhelming majority of the health care *qui tam* cases in which the United States does not intervene produce no recovery for the United States (or the relator) and a substantial number of those cases are dismissed, but only after burdensome and expensive pre-trial litigation. *See, e.g., United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 556-61 (8th Cir.), *cert. denied*, 127 S. Ct. 189 (2006); *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1309 (11th Cir. 2002).

The financial consequences of running afoul of the FCA can be extraordinary. The statute not only provides for treble damages, it also authorizes penalties of up to $11,000 *per claim*. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(9). Industries that submit thousands of claims each day, such as the long-term care industry, currently operate in the uncertainty that comes from not knowing how a court will apply concepts such as the false certification theory.

The need for definitive judicial guidance is further amplified by the fact that FCA enforcement policy is shaped in large part

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Cannon, and Hon. Charles E. Grassley, *Information on False Claims Act Litigation* 28 (Jan. 31, 2006) (noting that 45.98 percent of *qui tam* cases involved alleged health care fraud).

by self-deputized relators who sue on behalf of the government seeking a bounty. Such persons wield extraordinary power and are not subject to adequate control by the Executive Branch. Judicial uncertainty regarding what constitutes a "false or fraudulent" claim within the meaning of the FCA often places extraordinary pressure on companies to settle otherwise-unmeritorious suits rather than risk financial ruin caused by an adverse ruling under the FCA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 06-1006

FILED
MAR 26 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

UNIVERSITY OF PHOENIX,

Petitioner,

v.

UNITED STATES EX REL. MARY HENDOW AND JULIE ALBERTSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE CAREER COLLEGE ASSOCIATION IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The Career College Association is a voluntary membership organization of over 1,150 private, accredited, postsecondary colleges, universities, schools, and institutes located throughout the United States. These member institutions cover the full range of postsecondary education, from certificate and diploma programs to programs leading to associates, masters, and doctoral degrees. The Career College Association's members, which for the most part are organized as tax-paying entities, enroll nearly 2 million students each year. These students train for employment in over 200 occupational fields and constitute approximately one-half of the technically trained workers who enter the U.S. workforce each year. The vast majority of the Career College Association's member institutions participate in one or more of the federal student financial aid programs, as well as in other federal, state and local education and workforce training programs. The Career College Association and its member institutions have an interest in this matter because the decision below drastically expands the circumstances under which a relator may maintain a False Claims Act action against a postsecondary institution.

SUMMARY OF ARGUMENT

The Court should grant the petition for two reasons. *First*, this case is of exceptional importance to all postsecondary institutions. The Ninth Circuit has held that alleging a false statement made in connection with any condition of eligibility to participate in any federal benefit program, or alleging a knowing course of conduct that

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[1] The Career College Association has submitted letters to this Court evidencing the consent of the parties to the filing of this brief. Pursuant to Supreme Court Rule 37.6, the Career College Association states that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members or its counsel, has made any monetary contribution to the preparation or submission of this brief.

violated any condition of eligibility to participate in any such program, states a claim under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.* The implications of this holding are dire. As construed by the Ninth Circuit, every one of the hundreds of statutory and regulatory provisions applicable to any of the student financial aid programs authorized under Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1070 *et seq.* ("Title IV Programs"), constitutes a condition of eligibility for participation in the Title IV Programs.

Even though this case involves one specific condition of eligibility – the restriction on incentive compensation[2] – this broad holding exposes postsecondary institutions to crushing financial liability under the FCA for *any* knowing violation of *any* Title IV statute or regulation, no matter how minor or technical the violation. The portion of 34 C.F.R. § 668.14 imposing the restriction on incentive compensation quoted by the Ninth Circuit, Pet. App. 15a-16a, also conditions initial and continued participation in the Title IV Programs "upon compliance with . . . any additional conditions specified in the program participation agreement that the Secretary requires the institution to meet." 34 C.F.R. § 668.14(a)(1). The Program Participation Agreement ("PPA") is the form contract every postsecondary institution must execute to participate in the Title IV Programs. Among those additional conditions specified in the PPA is that the institution "will comply with all statutory provisions of or applicable to Title IV of the HEA [and] all applicable regulatory provisions prescribed under that statutory authority. . . ." Pet. App. 29a.

In holding that every one of the literally hundreds of "applicable" statutory and regulatory provisions necessarily

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[2] The term "restriction," rather than "ban" or "prohibition," is used advisedly because in 2002 the Secretary amended 34 C.F.R. § 668.14(b)(22) by, *inter alia*, adding subsections (ii)(A)-(L), which contain a non-exclusive list of "[a]ctivities and arrangements that an institution may carry out without violating the provisions of (b)(22)(i) of this section. . . ." 34 C.F.R. § 668.14(b)(22)(ii).

is a condition of eligibility, the Ninth Circuit has transformed the FCA from its intended purpose "to combat and deter fraud," *United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637, 645 (6th Cir. 2002), into a potentially lethal trap for any postsecondary institution alleged to knowingly be in violation of even one of what the Ninth Circuit broadly defines as conditions of eligibility for participation in the Title IV Programs. Moreover, this particular trap is replete with mandatory double or treble damages and additional monetary penalties. Under the "condition of eligibility" theory, these damages potentially apply to *all* amounts received by a postsecondary institution arising from its participation in the Title IV Programs. Because this potential for draconian FCA liability far exceeds the ability of even the largest school, college, or university to withstand, the Ninth Circuit's holding creates tremendous pressure to expend exorbitant sums to either dispute or settle meritless claims based on a so-called condition of eligibility.

As Petitioner University of Phoenix ("University") has demonstrated, Pet. 10-18, the courts of appeal are irreconcilably split as to whether FCA liability attaches when an alleged false statement is made in connection with a so-called condition of eligibility, rather than a condition of payment. The lack of a uniform interpretation of the reach of FCA liability creates an intolerable state of affairs for the Career College Association's member institutions, which are located throughout the United States and many of which have campuses in multiple jurisdictions. Even worse, those of its members located within circuits that have not addressed this issue do not know what the law requires. Thus, those members are under the same intense pressure to settle as those institutions within the Ninth Circuit, quite independent of the merits of the claim. Review by the Court is therefore warranted.

Second, the Court should grant the petition to provide much needed guidance to the lower courts regarding the interrelationship between a relator's Title IV FCA claims and the well-defined, comprehensive, and mandatory set of administrative procedures the Education Department has

established for the specific purpose of resolving allegations identical to those made by the relators. Currently, the lower courts' rulings lack consistency when faced with a relator's Title IV FCA claims that depend upon issues which defendant postsecondary institutions have a statutory, regulatory, or contractual right to have the Education Department resolve. Some courts (*see, e.g., United States ex rel. Siewick v. Jamieson Sci. and Eng'g, Inc.*, 214 F.3d 1372 (D.C. Cir. 2000)) have held that the viability of the FCA claim is contingent upon the results of the Education Department proceedings, whereas other courts (such as the Ninth Circuit below) have determined that the administrative remedy is irrelevant.

The case below exemplifies the problem. The Education Department conducted a program review of the allegations made by the relators in accordance with the processes provided by statute (20 U.S.C. § 1099c-1) and regulation (34 C.F.R. §§ 668.111-668.124). As Petitioner informed the Court, "that review culminated in a settlement agreement in which [the University] did not admit any liability" and was not required "to repay any of the financial aid received by its students, change any of its practices for compensatory admissions counselors, or discipline any of its employees." Pet. 6.[3] Despite this resolution with the expert agency charged with enforcement of the incentive compensation rules, the Ninth Circuit held that "[t]hese questions of enforcement power are largely academic," Pet. 15a, and deemed the results of the program review and settlement agreement irrelevant to the University's potential FCA liability.

As explained in greater detail below, this Court should review the Ninth Circuit's holding because it (a) intrudes on the statutory responsibility of the Secretary of Education; (b) violates the contract between the Secretary of Education and the University (and every other postsecondary institution participating in the Title IV Programs);

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[3] The Ninth Circuit took judicial notice of the settlement agreement.

and (c) conflicts with the prior well-reasoned decision of the United States Court of Appeals for the District of Columbia Circuit in *United States ex rel. Siewick v. Jamieson Sci. and Eng'g, Inc.*, 214 F.3d 1372.

Accordingly, review by this Court is warranted to address the issues set forth above.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION IS OF EXCEPTIONAL IMPORTANCE BECAUSE IT DRAMATICALLY EXPANDS THE SCOPE OF THE FALSE CLAIMS ACT AND EXPOSES POSTSECONDARY INSTITUTIONS TO CRUSHING FINANCIAL LIABILITY FOR AN ALLEGED VIOLATION OF EVEN MINOR REGULATORY PROVISIONS.

The Ninth Circuit's decision below creates massive and potentially ruinous financial exposure for a vital segment of this Nation's economy. The Ninth Circuit held that a knowing violation of any of the hundreds of statutory and regulatory provisions with which a higher education institution agrees to comply in obtaining access to the Title IV Programs creates FCA liability. In the opinion of the Ninth Circuit, compliance with each of those statutes and regulations is "causally related" to the government's decision to pay Title IV funds, because, in its view, there is no meaningful difference between a condition of eligibility to participate in the Title IV Programs and a condition of payment to receive disbursal of specific Title IV funds. Pet. App. 15a.

The Ninth Circuit's aggressive expansion of the scope of FCA liability contains no limiting principle. In fact, the Ninth Circuit held that "[i]f a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork." Pet. App. 13a (internal citation and quotation omitted). In other words, in the Ninth Circuit, it is irrelevant which Title IV statute or

regulation is violated because they are all equal – no matter how minor or technical the violation. Indeed, the Ninth Circuit held that "fraud is fraud, regardless of how 'small'." Pet. App. 14a. The disastrous untoward consequences of such a broad pronouncement in the Title IV context requires this Court's review.

The portion of the regulation quoted by the Ninth Circuit which includes the restriction on incentive compensation (34 C.F.R. § 668.14(a)(1), Pet. App. 15a-16a), in fact could not be any broader. The referenced regulation conditions initial and continued participation in the Title IV Programs "upon compliance with [1] the provisions of this part [Part 668 of Title 34, Code of Federal Regulations, 34 C.F.R. §§ 668.1-668.198], [2] the individual program regulations [34 C.F.R. §§ 673.1-690.83], and [3] any additional conditions specified in the program participation agreement that the Secretary requires the institution to meet." 34 C.F.R. § 668.14(a)(1).

Consequently, precisely the same broad FCA liability that the relators alleged in the case below necessarily would attach to a knowing violation of a multitude of regulatory requirements (no matter how perfunctory or minor) incorporated in the same regulation because each meets the Ninth Circuit's definition of a condition of eligibility. The chart below sets forth a few of these requirements:

Regulation	**Requirements**
34 C.F.R. § 668.14(b)(3)	The institution will not request or charge a student a fee to determine the student's eligibility for Title IV financial aid.
34 C.F.R. § 668.14(b)(6)	The institution will comply with the standards of administrative capability set out in 34 C.F.R. § 668.16, which include: • designating "a capable individual to be responsible for administering all" Title IV programs, 34 C.F.R. § 668.16(b)(1);

Regulation	Requirements
	• using "an adequate number of qualified persons to administer" the Title IV programs in which the institution participates, 34 C.F.R. § 668.16(b)(2); and • administering the Title IV Programs "with adequate checks and balances in its system of internal controls," 34 C.F.R. § 668.16(c)(1).
34 C.F.R. § 668.14(b)(7)	The institution will submit reports to the Secretary "at such times and containing such information as the Secretary may reasonably require to carry out the purpose of the Title IV, HEA programs."
34 C.F.R. § 668.14(b)(9)	The institution will comply with the requirements of subpart D, 34 C.F.R. §§ 668.41-668.48, which include publishing and making readily available to students information on: • "all the Federal, State and local, private and institutional" financial aid available to that institution's students, 34 C.F.R. § 668.42(a)(1); • information on estimated transportation costs for students, 34 C.F.R. § 668.43(a)(1)(iv); • information on completion and graduation rates, 34 C.F.R. § 668.45; • an annual security report, 34 C.F.R. § 668.46(b); and • an annual report of crime statistics, 34 C.F.R. § 668.46(c).

Regulation	Requirements
34 C.F.R. § 668.14(b)(19)	The institution "will complete, in a timely manner and to the satisfaction of the Secretary, surveys ... as designated by the Secretary, regarding data on postsecondary institutions."
34 C.F.R. § 668.14(b)(20)	All coeducational institutions with intercollegiate athletic programs attended by students receiving athletically-related student financial aid required to submit annually by July 1 the reports required by 34 C.F.R. § 668.48. These reports require, *inter alia*, the institution to report: • the number of all students who attended during the year prior to the report, categorized by race and gender; • the number of those students who received athletically-based financial aid, categorized by race and gender; • their completion or graduation rates, categorized by race and gender within each sport; • the average completion or graduation rate for the four most recent completing or graduating classes, and • who received athletically-based financial aid categorized by race and gender within each sport.

To take only one of many possible examples, under the holding in the case below (and in *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005), *cert. denied*, 126 S.Ct. 1786 (2006)), an institution's

obligation to file by July 1 the reports regarding athletically-related student financial aid required by 34 C.F.R. §§ 668.14(b)(20) and 668.48(a) is a condition of eligibility. Thus, if a relator alleges that a postsecondary institution executed its PPA on June 1 knowing that these reports would not be filed by July 1, as required by 34 C.F.R. § 668.48(a)(1), and those reports were not filed until August 1 of that year, the postsecondary institution would risk being found in violation of those regulations and 20 U.S.C. §§ 1094(a)(5), (7) and (18).[4] That violation would necessarily render the postsecondary institution liable under the FCA for mandatory damages equal to double or treble ***all of the Title IV aid it disbursed*** plus a mandatory per claim penalty,[5] a sum in the hundreds of millions of dollars for many postsecondary institutions and in the billions for others,[6] and far beyond the capacity of any institution to repay.

Because the Ninth (and Seventh) Circuits view FCA liability through the prism of a "but for" test, this crushing FCA liability is the same whether these reports were filed one day late, one month late or were never filed at all because, under the Ninth Circuit's view, filing by July 1 is

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[4] 20 U.S.C. § 1094(a) provides that "to be an eligible institution . . . an institution . . . shall . . . enter into a program participation agreement with the Secretary." This section further requires that "[t]he agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with" numerous requirements, including: "(5) The institution will submit reports to the Secretary . . . at such times and containing such information as the Secretary may reasonably require. . . . (7) The institution will comply with the requirements of section 1092 [titled "Institutional and financial assistance information for students"] of this title. . . . (18) The institution will meet the requirements established pursuant to section 1092(g) [titled "Data required"] of this title." 20 U.S.C. § 1094(a).

[5] The statutory penalties are adjusted upward for inflation under the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, § 5, 104 Stat. 891, note following 28 U.S.C. § 2461. The penalty is currently $5,500 to $11,000. 28 C.F.R. § 85.3(a)(9).

[6] The University itself has received over $500,000,000 in Title IV funds annually since at least January 1, 1997. C.A. E.R. 44, ¶ 1.

a condition of eligibility. Furthermore, the Ninth Circuit's decision offers no basis for distinguishing among the above examples and any of the hundreds of other applicable Title IV statutes and regulations. Violation of any one of these requirements could result in liability to a postsecondary institution of more than triple all federal financial aid it disbursed to students.

In fact, this limitless "daisy chain" approach has already been taken one step further by at least one district court, which has classified all of the requirements imposed by third party accrediting agencies as conditions of eligibility that could be used to support an FCA claim. *United States v. Chapman Univ.*, 2006 WL 1562231 (C.D. Cal. May 23, 2006). There, the relators alleged Chapman University ("Chapman") falsely certified compliance with the standards of its accrediting agency when, according to the relators, Chapman did not comply with those standards regarding the number of actual *classroom hours* of instruction. *Id.* at *6. Because one of the requirements of participation in the Title IV Programs is accreditation, the district court held that "but for" the allegedly false statements Chapman University provided to its accrediting agency, "Chapman would not have been granted certain [Title IV] grants and loans." *Id.* at *3 (footnote omitted).[7] Thus, in the district court's view, "[n]o more [wa]s required to state a claim under the FCA" and to survive a motion to dismiss. *Id.*

The common thread among the case below, the Seventh Circuit's holding in *Main,* and the district court's decision in *Chapman University* is that in each the relators alleged that a condition of eligibility had been knowingly violated, and that all federal funds disbursed were accordingly subject to recovery under the FCA. However, the sweeping conclusion that a postsecondary institution – or any other participant in a federal benefits program – was never entitled to any of those benefits if it knowingly

[7] Although not cited in its opinion, 20 U.S.C. § 1094(a)(21) provides that "[t]he institution will meet the requirements established by the Secretary and accrediting agencies or associations. . . ."

violated what the Ninth and Seventh Circuits define as a condition of eligibility is too simplistic an answer to the complex legal issues posed by this case. The holdings of the Ninth and Seventh Circuits impose precisely the same draconian financial consequences without regard to how the expert agency charged with enforcing the regulatory scheme at issue views the alleged violation.

In contrast, the analytical starting point to examine the chain of causation for potential FCA liability in, for example, the Fifth and the Second Circuits is whether the alleged false or fraudulent claim or statement was in connection with a condition of payment. Thus, in a case involving essentially identical allegations to those made in the case below and in *Main,* the Fifth Circuit affirmed the dismissal of the relators' claims in part because the "documents [including the PPA] Relators allege as a basis for [the postsecondary institution's] liability under the False Claims Act do not certify compliance as an express condition to payment." *United States ex rel. Graves v. ITT Educ. Servs., Inc.*, 284 F. Supp. 2d 487 (S.D. Tex. 2003), *aff'd*, 111 Fed. Appx. 296 (5th Cir. 2004), *cert. denied*, 544 U.S. 978 (2005).[8]

The *Graves* court also based its holding on the fact that "[i]n contrast to the [Medicare] regulations at issue in [*United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1040 (S.D. Tex. 1998), which expressly prohibited the payment of government funds for services rendered in violation of the physician anti-referral statute], the regulations at issue here do not expressly condition payment or retention of the student loans and grants paid on behalf of students under Title IV, HEA on the submission of certification of compliance with the regulation or statute at issue." *Id.* at 502. *Accord United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 459 F. Supp. 2d 1081, 1086 (D. Kan. 2006) ("A legally

[8] In affirming, the Fifth Circuit stated it was doing so "essentially for the reasons stated in [the district court's] memorandum opinion and order." 111 Fed. Appx. at 297 (footnote omitted).

false certification of compliance with a statute or regulation cannot form a viable FCA cause of action unless payment is *expressly conditioned* on that certification.") (emphasis in the original) (citations omitted).

As the Second Circuit points out, there are specific provisions in the Medicare statute that expressly prohibit payment in certain circumstances, such as "the requirement that the particular item or service be 'reasonable and necessary.'" *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001). However, there are no such provisions in the Higher Education Act. To the contrary, the Secretary of Education "is expressly charged in the statutory scheme with determining eligibility. . . ." *Sistema Universitario Ana G. Mendez v. Riley*, 234 F.3d 772, 779 (1st Cir. 2000).

Thus, the foundational presumption in the case below, *Main*, and *Chapman University* that a postsecondary institution's eligibility to participate in the Title IV Programs is automatically forfeited by a knowing violation of a condition of eligibility is simply wrong. In fact, the Secretary's discretion is explicitly prescribed in 34 C.F.R. § 600.41(a): "If the Secretary believes that a previously designated eligible institution as a whole, or at one or more of its locations, *does not satisfy* the statutory or regulatory requirements that define that institution as an eligible institution, the Secretary *may*" (emphasis added) take one or more of the various administrative actions against the institution delineated there.[9] And where a civil penalty is to be imposed, the Higher Education Act is explicit in *requiring* the Secretary to take into consideration "the appropriateness of the penalty to the size of the institution of higher education subject to the determination, and the gravity of

[9] This regulation has the force and effect of law and hence is "binding on courts in a manner akin to statutes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979).

the violation, failure, or misrepresentation" in setting the amount of such penalty. 20 U.S.C. § 1094(c)(3)(B)(ii).[10]

Furthermore, even when the Secretary has determined that an institution as a whole or an entire program was not eligible, the Secretary has broad discretion regarding what action, if any, to take. *See, e.g., In re Beth Jacob Hebrew Teachers Coll.*, Dkt. No. 96-77-SP, Decision of the Secretary (Oct. 13, 1998) (Secretary held that "in accordance with my discretionary authority" college would not be required to pay back any Title IV funds disbursed to students in an ineligible program);[11] *In re Mary Holmes Coll.*, Dkt. No. 94-32-SP, U.S. Dep't of Educ. (March 30, 1995), Certified as Final Decision by the Secretary (Sept. 18, 1995) (When violation of Title IV is deemed only technical in nature, the extreme remedy of declaring the program to be ineligible is unwarranted, absent other aggravating circumstances);[12] *In re French Fashion Acad.*, Dkt. No. 89-12-S Decision of the Secretary, 1990 WL 357908 (ED. O.H.A. March 30, 1998) (School not required to pay back Title IV funds during period its state license was expired when State's subsequent renewal was retroactive);[13] *In re Baytown Technical Sch., Inc.*, Dkt. No. 91-40-SP, Decision of the Secretary, 1994 WL 907417, *3 (ED. O.H.A. April 12, 1994) (School not required to pay back Title IV funds during period certain programs and locations were

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[10] The maximum civil penalty, currently up to $27,500 per violation, 34 C.F.R. § 668.84(a), is adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, § 5, 104 Stat. 891, note following 28 U.S.C. § 2461.

[11] United States Department of Education Decision, http://www.ed-oha.org/secretarycases/1996-77-SP2.pdf (last visited March 21, 2007).

[12] United States Department of Education Decision, http://www.ed-oha.org/cases/1994-32-sp.html (last visited March 21, 2007).

[13] 20 U.S.C. § 1094(a)(21) provides that "[t]he institution . . . will provide evidence to the Secretary that the institution has the authority to operate within a State."

not accredited when accreditation was subsequently granted retroactively).[14]

Had any of these postsecondary institutions been the subject of an FCA claim in the Ninth or Seventh Circuits, the resulting liability would have bankrupted every one of them, because the Ninth and Seventh Circuits presume that the Higher Education Act explicitly conditions payment of Title IV funds on compliance with all of the requirements of the PPA. However, that presumption ignores the broad discretionary authority Congress has vested in the Secretary and also contravenes the law, which *obligates* the Secretary to fashion a remedy commensurate with the nature of both the violation and the institution. The massive expansion of FCA liability resulting from that erroneous presumption is so destructive that review by this Court is required.

II. THE PETITION SHOULD BE GRANTED TO PROVIDE GUIDANCE TO THE LOWER COURTS RESPECTING THE INTERRELATIONSHIP BETWEEN A RELATOR'S FALSE CLAIMS ACT CLAIMS AND AN AGENCY'S ADMINISTRATIVE PROCEDURES FOR ADDRESSING REGULATORY VIOLATIONS.

This Court should also grant the petition to provide much needed guidance to the lower courts respecting the interrelationship between a relator's Title IV FCA claims and the well-defined, comprehensive, and mandatory set of administrative procedures the Education Department has established for the specific purpose of resolving allegations identical to those made by the relators.

In holding that the enforcement powers of the Secretary of Education are "largely academic" in an FCA case, Pet. App. 15a, the Ninth Circuit has ignored the expert agency's well-defined, comprehensive, and mandatory administrative mechanism. Accordingly, this Court should

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[14] *See* note 7, *infra*.

review this holding because it (a) intrudes on the statutory responsibility of the Secretary of Education; (b) violates the contract between the Secretary of Education and the University (and every other postsecondary institution participating in the Title IV Programs); and (c) conflicts with the decision of the United States Court of Appeals for the District of Columbia in *Siewick*.

To provide context, it is appropriate first to describe the Secretary's enforcement powers. Congress has vested the Secretary of Education with broad enforcement powers that can be invoked immediately,[15] prospectively,[16] and retrospectively.[17] The Secretary also has the power to assess civil penalties of up to $27,500 for each violation of any of the various statutory and regulatory requirements of the Title IV Programs. *See* 20 U.S.C. § 1094(c)(3)(B); 34 C.F.R. § 668.84(a).[18]

Each of the Secretary's enforcement powers includes detailed provisions for substantive and procedural due process. 34 C.F.R. §§ 668.81-668.123. Moreover, by its terms, the PPA can only be terminated by the Secretary in accordance with the procedures set out in 34 C.F.R. §§ 668.81-668.98. Pet. App. 38a and 34 C.F.R. § 668.14(f)(1).

The role of the Secretary in overseeing all of the Title IV Programs was aptly described in an administrative decision, *In re Fundacion Educativa Ana G. Mendez*, Dkt. No. 94-30-SA, U.S. Dept. of Educ., Decision upon Remand

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[15] *See* 20 U.S.C. § 1094(c)(1)(G) (emergency actions halting all Title IV payments).

[16] *See* 20 U.S.C. § 1094(c)(1)(F) (limitations, suspensions and terminations of participation in Title IV Programs).

[17] *See* 20 U.S.C. § 1099c-1 (program reviews conducted by the U.S. Department of Education of a higher education institution's compliance with the various statutory and regulatory requirements of the Title IV Programs) and 20 U.S.C. § 1094(c)(1)(A) (annual compliance audits prepared by independent auditors detailing each higher education institution's compliance with the various statutory and regulatory requirements of the Title IV Programs).

[18] *See* note 10, *infra*.

(July 16, 1998), Certified as Final Decision by the Secretary (February 18, 1999), *aff'd, Sistema Universitario Ana G. Mendez v. Riley*, 234 F.3d 772 (1st Cir. 2000):

> As part of the federal government's obligation to safeguard federal student financial assistance funds, a tri-partite gatekeeping system has been established. The participants in this gatekeeping function include: accrediting agencies which have been approved by the Secretary to be the judge of the quality of the content of education programs; state licensing bodies which oversee the legal existence of education programs within their respective states; and [the U.S. Department of Education] which has the overall responsibility to scrutinize the compliance with federal law of all Title IV participants. Although accrediting agencies and state licensing bodies are, indeed, independent entities, they do not operate in a vacuum in so far as Title IV issues are concerned – Congress has delegated to the Secretary the final and ultimate authority to determine whether or not compliance with Title IV is achieved. In a previous decision, the Secretary determined that when an accrediting agency failed to comply with Title IV in making an accreditation decision, he could overturn the accreditation decision in so far as it impacted on Title IV. *See generally, In re Webster Career College, Inc.,* Docket No. 91-39-SP, U.S. Dep't of Educ. (Decision of the Secretary, July 23, 1993).

(at 3).[19]

In addition, every PPA grants the institution the right to the administrative processes set out in the Title IV regulations. Indeed, in *San Juan City College v. United States*, 391 F.3d 1357, 1363 (Fed. Cir. 2004), the Federal Circuit held that the government is liable for damages for

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[19] United States Department of Education Decision, http://www.ed-oha.org/cases/1994-30-sa.rem.html (last visited March 21, 2007).

its breach of the PPA, where it cut off Title IV funds to the college without complying with the notice and hearing requirements of 20 U.S.C. § 1094 and 34 C.F.R. §§ 668.81-668.98.

In light of postsecondary institutions' contractual right to these administrative procedures and the Secretary's discretion and expertise in the administration of the Title IV Programs, the correct way to harmonize the enforcement powers of the Secretary with the exclusive right of the Attorney General to prosecute claims under the FCA is presented by the District of Columbia Circuit's decision in *Siewick*. In that FCA case, the District of Columbia Circuit, in balancing the respective regulatory and FCA statutory schemes, concluded that the interests of both could best be harmonized by recognizing the administrative agency's authority to determine whether the contract at issue was void or merely voidable.

The relator's theory in *Siewick* was similar to that presented here: the defendant "knew that the contract" at issue was void or voidable (because the defendant had violated a representation that it had complied "with all applicable law") and thus knew that it was not entitled to be paid. *Id.* at 1376. In rejecting this claim, the District of Columbia Circuit first explained the difference between void contracts ("one under which the promisor has no duty of performance") and voidable contracts ("one under which a party . . . may '*elect*' to avoid any legal obligations"). *Id.* (emphasis in original; citations omitted). After first concluding that the relator's claim was flawed because the FCA required facts "that the speaking party could reasonably classify as true or false," whereas here "there is only legal argumentation and possibility," *id.* at 1378, the District of Columbia Circuit explained that it is the agency's prerogative to declare contracts invalid, not that of *qui tam* relators:

> [E]ven assuming that [the contractor's] contracts were voidable, invalidity is a distinct issue. [Relator's] theory is concededly and necessarily that [the contactor] knew that the contracts were invalid. But even if voidable they

> would have become invalid only on a contingency – the contingency that the government would exercise the assumed right to disclaim.
>
> [Moreover], a court that found contracts invalid in a *qui tam* action where the government has not joined the plaintiff would have ultimately divested the government of the opportunity to exercise precisely the discretion that is among the key differentiations of voidness from voidability: the discretion to accept or disaffirm the contract on the basis of complex variables reflecting the officials' views of the government's longterm interests.

Id.[20]

Accordingly, this Court should grant review because, contrary to the result in *Siewick*, the "but for" test adopted in the case below (as well as in *Main* and *Chapman University*) improperly disregards the essential role of the Secretary in determining (a) whether a false statement in a condition of eligibility is indeed false and, (b) even if it is, what effect, if any, that falsity will have on the institution's eligibility to receive Title IV funds. Under those courts' "but for" test, the University's PPA is deemed automatically void for purposes of a motion to dismiss if the relators merely allege that the University signed the PPA knowing that it did not intend to comply with one of its provisions. As the *Siewick* court explained:

> The implications of Siewick's position are extraordinary. Disputes arise between the government and its contractors every day. Contractors do not win every penny they claim. On Siewick's theory, any contracting party that misunderstands its legal entitlements and therefore fails to recover on an invoice in full would be liable

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[20] *See also United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961) ("This protection [from corrupting influences] can be fully accorded only if contracts which are tainted by a conflict of interest . . . may be disaffirmed by the Government.").

> under the False Claims Act – except in instances where it was unaware of the facts that led to its failure to recover in full. This is not a prescription for fair or efficient contracting.

Id. at 1378.

The Ninth Circuit's own decisions support *Siewick*'s view as to the proper balance necessary when dealing with the respective regulatory and FCA statutory schemes. *See, e.g. United States ex rel. Plumbers & Steamfitters Local Union No. 342 v. Caputo*, 152 F.3d 1060, 1062 (9th Cir. 1998). In that case, the Ninth Circuit held that deferral to the U.S. Department of Labor with respect to whether employees had been misclassified under the Davis-Bacon Act was proper and ordered a stay of the FCA case until the agency ruled.

The agency's regulatory processes also were ordered to be completed ahead of the judicial process in *United States ex rel. Rahman v. Oncology Assoc., P.C.*, 198 F.3d 502 (4th Cir. 1998), which involved FCA claims based on allegations of fraudulent Medicare billing. The Fourth Circuit held that defendant health care provider was entitled under the applicable regulations to a decision in accordance with specific administrative procedures as to whether it had been overpaid and whether reimbursements should be temporarily suspended while the administrative process was ongoing. *Id.* at 512-13. In so holding, the Fourth Circuit rejected the contention made by the United States that "the agency cannot effectively and accurately make the overpayment determinations and that the discovery and fact finding mechanisms provided by the judicial process will assist in that effort." *Id.* at 513. The Fourth Circuit also concluded that accepting the United States' argument would dictate an unacceptable result; namely, having "the outcome of this judicial proceeding provide the basis for the overpayment determination" required by the regulations. *Id.* at 514.

Thus, this Court should grant the petition to provide much needed guidance to the lower courts respecting the interrelationship between a relator's Title IV FCA claims

and the well-defined, comprehensive, and mandatory set of administrative procedures the Education Department has established for the specific purpose of resolving allegations identical to those made by the relators. The need for such guidance in light of the intrusion on the statutory responsibility vested by Congress in the Secretary of Education is particularly acute in this case. After reviewing the relators' allegations, the Secretary of Education and the University entered into a settlement. One aspect of that settlement is that the University's PPA was not voided but, to the contrary, the University continues to participate in the Title IV Programs under its PPA. However, under the Ninth Circuit's holding, not only is that irrelevant, but also if the relators are able to prove at trial that the University knowingly violated a so-called condition of eligibility, the court will void the University's PPA as a matter of law.

CONCLUSION

For the foregoing reasons, the Career College Association endorses the arguments made by Petitioner and urges this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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March 26, 2007

(3)

No. 06-1006

FILED
MAR 26 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

UNIVERSITY OF PHOENIX,

Petitioner,

v.

UNITED STATES EX REL.
MARY HENDOW AND JULIE ALBERTSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST

With the written consent of the parties, reflected in letters on file with the Clerk, *Amicus Curiae* the National Defense Industrial Association ("NDIA") submits this brief in support of Petitioner, pursuant to Rule 37.3(a) of this Court.[1]

NDIA is a non-profit organization comprised of more than 1,200 corporations and 39,000 individuals spanning the entire spectrum of the defense industry. Members include individuals from academia, government, the military services, small businesses, corporations, prime contractors, and the international community. They fulfill a large share of the Department of Defense's ("DOD") contracts for goods and services. Members are located in and perform services and contracts throughout the United States.

Application of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, is of great concern to NDIA's members. The FCA subjects defendants to treble damages and civil penalties of $5,500 to $11,000 for each false claim. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9) (inflation adjustment pursuant to 28 U.S.C. § 2461). Moreover, such claims can be brought by any citizen as a *qui tam* relator. 31 U.S.C. § 3730(b). The relator may share in the recovery. 31 U.S.C. § 3730(d).

Defense contractors are particularly susceptible to FCA lawsuits brought by *qui tam* relators. In the past

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[1] No party to this proceeding authored this brief in whole or in part, and no person or entity other than the National Defense Industrial Association ("NDIA") or its members contributed money to the preparation or submission of the brief. *See* Sup. Ct. R. 37.6.

twenty years, more than thirty percent of the *qui tam* cases have involved government procurement contracts. U.S. Gov't Accountability Office, GAO-06-320R, Information on False Claims Act Litigation 28 (2006). More than a quarter of those suits involved DOD contracts. *See id.* at 26. According to recent statistics, district courts within the Ninth Circuit handled more than eighteen percent of all *qui tam* cases filed between 1987 and 2005. *Id.* at 27. Thus, the Ninth Circuit's decision under review, which NDIA believes employs a fundamentally flawed approach, will have a substantial impact on government contracting and NDIA's members. As such, NDIA has a significant interest in this matter.

SUMMARY OF ARGUMENT

In *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), the Ninth Circuit drastically expanded the reach of the FCA. Specifically, it decided that an alleged false statement or course of conduct in connection with establishing eligibility to obtain benefits under Title IV of the Higher Education Act (the "HEA") could render all requests for payment under the HEA *false* for FCA purposes, even if the payment requests were not false or did not result in financial harm to the government.

In other words, the ruling allows a *qui tam* relator – or the government – to bring an FCA lawsuit without requiring allegations that the defendant "use[d] . . . a false record or statement to get a false or fraudulent claim paid[,]" as expressly required by the FCA. 31 U.S.C. § 3729(a)(2). The Ninth Circuit also muddied the application of the law by expanding the elements of an FCA action and departing from limitations recognized by other

circuits. The impact of the ruling extends beyond the facts of *Hendow*. Defense contractors face substantial risk of increased liability under the FCA because of the Ninth Circuit's ruling.

This Court should grant certiorari because clear guidance is needed for all parties to FCA actions. The Ninth Circuit's decision is not only fundamentally wrong; it has added more confusion to an already convoluted array of cases interpreting the FCA. This Court needs to exercise this opportunity to provide a clear set of elements required to maintain an FCA action. Until it does so, parties and courts will be unable to determine what alleged activity is sufficient to warrant an FCA action. Additionally, judges will be unable to provide jurors instructions that will allow them to understand and apply the law to the facts of any given case.

In expanding the scope of the FCA, the Ninth Circuit has departed from the reasoning of other circuits, thus subjecting contractors to inconsistent treatment based upon the location of a *qui tam* suit. The Ninth Circuit's holding subjects contractors to potential FCA liability for a virtually infinite number of regulatory or statutory violations that may not be related to a claim for payment. Indeed, under the Ninth Circuit's holding, a contractor could still be subject to FCA liability even if it violates a regulatory provision which would not cause the government to deny payment. Under *Hendow*, the FCA would swallow whole the administrative and contractual disputes process that Congress has established to deal with contracting issues. As a result, the contractor would be subject to treble damages and civil penalties under the FCA no matter how minor the alleged regulatory violation.

The Ninth Circuit's decision could encourage *qui tam* relators to pursue FCA claims for settlement value even where there is no harm to the Government. *Qui tam* relators are motivated to bring suits by the promise of obtaining as much as thirty percent of the judgment. *See* 31 U.S.C. § 3730(d)(2). If the FCA is not applied consistently and in a manner that prevents frivolous and vexatious lawsuits by *qui tam* relators, businesses will be unable to manage the risks of FCA liability. Responsible businesses will be discouraged from providing valuable, needed services to the government, and the costs of government procurement will increase. NDIA urges this Court to grant the Petition for a Writ of Certiorari to provide guidance and ensure consistency for maintaining FCA lawsuits.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S *HENDOW* DECISION CAUSES SIGNIFICANT CONFUSION AS TO THE ELEMENTS REQUIRED TO MAINTAIN AN FCA ACTION, SUBJECTS GOVERNMENT CONTRACTORS TO UNWARRANTED LIABILITY, AND RAISES THE COST OF FEDERAL PROCUREMENTS.

A. Concrete Guidance From This Court for Applying the FCA Is Essential.

Under the plain language of the FCA, there must be either a "false or fraudulent claim for payment or approval" or a "false record or statement" which is used "to get a false or fraudulent claim paid" for liability to attach. 31 U.S.C. § 3729(a)-(b). Without guidance from this Court,

the lower courts have adopted two theories for FCA liability beyond the typical overcharge case – the "false certification" theory and "promissory fraud" (or fraud-in-the-inducement). In false certification cases, the claim may be accurate in that the request for payment is not overstated, but the falsity lies in the certification of compliance with conditions necessary to obtain payment. Promissory fraud cases generally require a showing that a contractor made false statements to obtain the contract and that the falsity resulted in financial harm to the government throughout the life of the contract. At issue for this Court are the proper limits of these theories.

Under the false certification theory, the Ninth Circuit stated that "two major considerations" exist: "(1) whether the false statement is the cause of the Government's providing the benefit; and (2) whether any relation exists between the subject matter of the false statement and the event triggering the Government's loss." *Hendow*, 461 F.3d at 1171 (*quoting United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) (quotations omitted)). The Ninth Circuit explained that four "conditions" are used in evaluating these "considerations." *See id.* at 1171-73.

First, according to the Ninth Circuit, there must be a false claim, which can include *either* a false "statement" or a "course of conduct." *Id.* at 1171, 1174. The false claim need only involve one falsity, no matter how minor, as to any of hundreds of boilerplate requirements. *See id.* at 1171. Second, the claim must be a "false statement of compliance with a government regulation that is a precursor to government funding." *Id.* at 1172 (quotations omitted). According to the Ninth Circuit, this includes a false certification, assertion, statement or "secret handshake" made to obtain a government contract *or* benefit status *or*

payments. *See id.* Third, the claim must be "material," which means it must be: (a) a prerequisite to obtaining a government benefit; (b) a *sine qua non* of receipt of government funding; and (c) conditioned on the certifications. *See id.* at 1172-73. Under this prong, the Ninth Circuit explains there need be no explicit statement making any of these requirements a "condition of *payment*" because a condition of participation is the same as a condition of payment. *See id.* at 1176. Fourth, the falsity need not be an actual claim for payment. *See generally id.* at 1173, 1177. Under *Hendow*, the falsity needs only be integral to the causal chain leading to payment, and how the claim is made with respect to timing or number of stages involved is immaterial. *Id.* at 1177.

After setting forth this extensive list of required elements for a false certification case, the Ninth Circuit then set forth the required elements under the promissory fraud theory and concluded that the elements for both theories are substantially the same. *See id.* at 1173-74. One key difference, however, is that under the promissory fraud theory, no false statement of compliance with any government regulation or statute is required. *Id.* at 1173. According to the Ninth Circuit, if the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct, then liability attaches to each claim submitted to the government under the contract, even if the claim is not false. *Id.* Subsequent claims become false because of the original false statements. *Id.* As to materiality, there must be a "causal" rather than "temporal" connection between the activity and the payment. *See id.* Thus, under either theory as posed by *Hendow*, liability can attach based on a true

representation that later becomes "false" through a course of conduct.

The Ninth Circuit's theories and elements are so complex that it is doubtful any juror could apply them correctly to any given set of facts, even if the Ninth Circuit were correct. This Court has recognized that the FCA was not designed to punish every type of fraud committed upon the government and that liability attaches not to underlying fraudulent activity but to a claim for payment. *See United States v. McNinch*, 356 U.S. 595, 599 (1958). Yet, in applying *Hendow*, judges and jurors are likely to find that any regulatory noncompliance, no matter how minor and no matter how attenuated from a claim for payment, is sufficient to state a claim under the FCA. Moreover, the Ninth Circuit's decision departs from the plain language of the statute, decisions of other circuits, and even its own prior decisions.

The elements set forth in decisions of other circuits are more consistent with the FCA than the decision of the Ninth Circuit. When deciding cases under the false certification theory, the majority of other circuits finds, consistent with the plain language of the FCA, that liability arises only when a claimant falsely certifies compliance with a statute or regulation that is a direct prerequisite to receiving government payment. *See, e.g., Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001) (discussing and expressly adopting the approach of the Fourth, Fifth and District of Columbia Circuits, and the previous position of the Ninth Circuit). For a viable action in these circuits, a certification must be made as an explicit condition of payment, that is, "to get a . . . claim paid." 31 U.S.C. § 3729(a)(2). Courts in these circuits also have stressed that "[a] general statement of adherence to all regulations or statutes

governing participation in a program through which federal funds are received is insufficient as a basis of False Claims Act liability." *United States ex rel. Graves v. ITT Educ. Servs.*, 284 F. Supp. 2d 487, 501 (S.D. Tex. 2003), *aff'd*, 111 F. App'x 296 (5th Cir. 2004). In other words, the courts have held that conditions of payment may give rise to FCA liability, but conditions of participation, such as future promises to comply with generally applicable statutes and regulations, do not. *Hendow* differs because it purports to convert all conditions of participation into conditions of payment.

In limited circumstances, courts have sustained FCA claims under the promissory fraud theory. Following this Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), other circuits have found that if a contractor commits a material fraud in obtaining a contract that increases the price to the government, then every invoice or request for payment under the contract could be a false claim under the FCA. *See, e.g., United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1786 (2006). Unlike the false certification theory, there is no requirement that a false statement be tied to discrete claims for payment. *See, e.g., id.* Accordingly, the promissory fraud theory opens contractors to exponentially greater liability by making each claim submitted under a contract a basis of liability without requiring a showing that the claim for payment was actually fraudulent. *See United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1326 (D.C. Cir. 2005).

Courts have carefully crafted limitations on the use of this promissory fraud theory, however, in light of its potentially crippling liability. *See, e.g., Graves*, 284

F. Supp. 2d at 503 ("The courts have emphasized that promissory fraud is a 'rare' basis for liability under the [FCA]."); *see also generally* JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 2.01[A][3], at 2-18 (3d ed. 2007). Before *Hendow*, even the Ninth Circuit recognized that promissory fraud is only "actionable in rare circumstances" because of its consequences. *Anton*, 91 F.3d at 1267. In *Anton*, the Ninth Circuit emphasized that "the promise must be false when made." *Id.* Other circuits have required an intent not to perform followed by "prompt, substantial nonperformance." *See, e.g., United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 386 (5th Cir. 2003). The courts have routinely required that a *qui tam* relator have proof that the government would not have entered the contract "but for" the alleged false statement. *E.g., Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999) (affirming the dismissal of the complaint because documents submitted by the defendant showed that the false statement was immaterial to the government's action); *Odebrecht Contractors*, 393 F.3d at 1327 (dismissing the relator's claim because "no reasonable jury could find that [the defendant] fraudulently induced the Corps to enter into the contract" by submitting an unreasonably low bid); *United States ex rel. Wilkins v. N. Am. Constr. Corp.*, 173 F. Supp. 2d 601, 636-37 (S.D. Tex. 2001) (dismissing complaint because the "government must instead allege that a reasonable agency would not have approved the contract had the true facts been stated in the bid"). *Hendow* departs from the restrictions set forth in these cases. Specifically, it would allow a statement of compliance that was originally true to be the basis for an FCA action if the contractor later falls out of compliance.

Hendow also strays from the limitations on the promissory fraud theory in another important respect. Courts have generally required a showing that the initial false promise had a financial impact throughout the life of the contract. This Court's decision in *Marcus* illustrates this point. In that case, a *qui tam* relator brought a lawsuit under the precursor to the modern-day FCA alleging that the defendants had engaged in collusive bidding on certain government projects. 317 U.S. at 539. The Court concluded that this particular fraud infected every dollar paid by the government under the contract. *Id.* at 543-44. The Court stated:

> This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the [government entity] into the joint fund for the benefit of respondents. The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal – payment of government money to persons who had caused it to be defrauded.

Id. In *Marcus,* the fraud to obtain the contract – bid rigging – caused every invoice and request for payment throughout the contract to be overstated. *Id.* On the other hand, where the "taint" of the original fraud does not cause the costs of the resulting contract to be "swollen," courts have refused to impose liability under the FCA. *See, e.g., United States ex rel. Trice v. Westinghouse Hanford Co.*, No. 96-CS-171-WFN, 2000 WL 34024248, at *21-22 (E.D. Wash. Mar. 1, 2000) (dismissing complaint because false statements did not cause any "swollen estimates"). *Hendow* does not require this showing. In fact, the Ninth Circuit allowed the *qui tam* relator's claim to go forward without any showing of financial harm to the Government.

Courts have also opined on still other elements and theories of FCA liability. The Seventh Circuit appears to cut the elements of the FCA promissory fraud theory to one statement: "Failure to honor one's promise is (just) breach of contract, but making a promise that one *intends* not to keep is fraud." *Oakland City Univ.*, 426 F.3d at 917. Other courts have varied approaches on materiality or the need to show the government suffered damages. *See, e.g.*, *Straus*, 274 F.3d at 695 (declining to determine whether a relator must show the government suffered damages).

Taken together, the cases present a confusing morass of theories and elements that make it imperative for this Court to take jurisdiction to provide concrete guidance. This is especially true given the significant harm, discussed hereinafter, that the Ninth Circuit's erroneously broad FCA application will impose.

B. The Ninth Circuit's Decision in *Hendow* Is Unreasonably Broad.

Congress never intended the FCA to serve as a catch-all provision for regulatory and contractual enforcement. It was not meant to serve as a substitute remedy for contract breaches or regulatory missteps. In fact, courts have routinely held that "violations of laws, rules, or regulations alone do not create a cause of action under the FCA." *E.g.*, *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997) (*quoting Anton*, 91 F.3d at 1266 (quotations omitted)). Yet, *Hendow* essentially allows *qui tam* relators to do just that. *Hendow* has significantly broadened the ability of *qui tam* relators to bring FCA lawsuits based on a contractor's forward-looking statement of general compliance with

applicable regulations or statutes. In addition, *Hendow* allows a contractor to be sued under the FCA for breaches of contract or violations of regulations wholly unrelated to payment.

Filtering through the multitude of elements and theories set forth in *Hendow,* the Ninth Circuit held that a condition of participation is the same as a condition of payment. *See* 461 F.3d at 1176. Under its rationale, even if there was no original false statement of compliance with a regulation or participation provision, the subsequent "falling out of compliance" can create liability – even if the noncompliance is best addressed through available administrative or regulatory penalties. However, a submission of a non-false claim for payment at a time when the company is not in compliance with all regulatory requirements of participation in a federally-funded program should not be sufficient by itself to render the claim *false* for purposes of the FCA. This is especially true when there are available remedies to address such unintended failures of compliance. For instance, although defense contractors, like other businesses, must comply with federal and state employment laws, allegations of discrimination within a defense contractor's operations should not turn garden-variety employment disputes into a *qui tam* relator's bonanza of treble damages provided by the FCA. Such noncompliance should not be sufficient to establish that an accurate claim for payment is a false claim for purposes of the FCA. Yet, the Ninth Circuit's opinion could lead to such a reading of the FCA.

The Ninth Circuit recognized the proper limits of the FCA in an earlier decision. In *Anton*, the Ninth Circuit noted that "[i]t is the false *certification* of compliance which creates liability when certification is a prerequisite

to obtaining a government benefit." 91 F.3d at 1266. The *Anton* court explained:

> Mere regulatory violations do not give rise to a viable FCA action. This is particularly true here where regulatory compliance was not a *sine qua non* of receipt of state funding. *There are administrative and other remedies for regulatory violations.* . . . [A]bsent actionable false certifications upon which funding is conditioned, the [FCA] does not provide such a remedy.

Id. at 1267 (emphasis added). In *Hendow*, however, the Ninth Circuit did away with these restrictions. Now, according to the Ninth Circuit, every condition of participation in a highly regulated program is the *sine qua non* for payment. Thus, every regulatory requirement in the highly regulated world of government contracting could now be considered indispensable and essential to obtain payment.

Hendow represents a substantial and troubling departure from the statute and its reasonable interpretation. An isolated event of noncompliance subsequent to obtaining a contract does not meet the requirement of "us[ing] . . . a false record" to "get a . . . claim paid" as set forth in the FCA. 31 U.S.C. § 3729(a)(2). Nor does it make the claim for payment "false when made" or an "intentional, palpable lie" as required by the Ninth Circuit's reasoning in *Anton*. 91 F.3d at 1267. Indeed, if there is no falsity tied to the claim for payment, Congress did not intend for FCA liability to attach. But in *Hendow*, the court says that *every* claim submitted *after* statements were made to be eligible for participation in the program will be converted into false claims if there is any subsequent change in conditions of eligibility. Thus, under

Hendow, any violation of a relevant law, rule or regulation may be deemed sufficient to state a cause of action under the FCA. The Ninth Circuit's decision effectively makes *all* instances of noncompliance with regulations governing participation in government contracts *relevant* to government disbursement decisions.

C. The Ninth Circuit's Decision Will Subject Defense Contractors to FCA Liability for Contractual Breaches and Regulatory Non-Compliance Even When the Contracting Governmental Authority Would Not Refuse Payment.

The *Hendow* decision could open the floodgates to lawsuits alleging that a contractor's failure to comply with any one of thousands of requirements constitutes a false certification for payment. The following scenarios illustrate the mischief that could occur.

For most large dollar contracts, potential contractors must undergo an evaluation to ensure compliance with equal opportunity laws as set forth in Parts II and IV of Exec. Order No. 11,246 (Sept. 28, 1965), 48 C.F.R. § 22.805 (2006). And, through a standard contract clause, the contractor promises to comply with those various laws. 48 C.F.R. § 52.222-26. Congress has also provided for contractual and administrative remedies that may be enforced by the Government Contracting Officer for non-compliance. 48 C.F.R. § 22.809. At the same time, Congress has enacted laws for individuals to pursue remedies for employment discrimination. *See generally* 42 U.S.C. § 2000e-5. The *Hendow* decision encourages disenchanted employees to sidestep the employment discrimination resolution process and seek to share in wide-ranging FCA damages. An employee could assert that the company's alleged

discrimination violated its general contractual promise to comply with federal and state employment discrimination laws. *See* 48 C.F.R. § 52.222-26. As a result, instead of being liable under discrimination laws, a defense contractor could be liable for treble damages and civil penalties under the FCA for every request for payment made under its contract. By this means, *Hendow* would encourage plaintiffs to avoid the discretionary administrative remedies that Congress has prescribed.

In another example, any contractor that receives a contract over $500,000 in a negotiated acquisition must agree to a subcontracting plan in which it agrees to goals for use of small and socially-or-economically-disadvantaged businesses. *See* 48 C.F.R. §§ 19.702, 19.704(a)(1). The government has specific administrative remedies for non-compliance. If a contractor does not make a good faith effort to meet its goals, it is in material breach of the contract. 15 U.S.C. § 637(d)(8). The government can assert liquidated damages in an amount equal to the missed goal. 15 U.S.C. § 637(d)(4)(F); 48 C.F.R. § 19.705-7(b). Disputes over the propriety of liquidated damages assessments or over a termination for default are subject to the administrative and disputes process of the Contract Disputes Act ("CDA"), codified at 41 U.S.C. §§ 601-613. Using *Hendow*, however, a *qui tam* relator could bring an FCA action alleging that every payment made under the contract was a false claim because the company was not in compliance with its subcontracting plan. As such, the discretion of the Government Contracting Officer to determine whether it is appropriate to declare a material breach of contract and assess liquidated damages for the non-compliance would be usurped by the *qui tam* relator. And, the ability of the

government and the contractor to resolve the dispute through the CDA process would be eliminated.

This Court should be wary of allowing juries to substitute their judgment for decisions that are entrusted by statute to the discretion of government officials. There are, indeed, certain instances of technical non-compliance with law or regulation that such officers, in the wise exercise of their discretion, may choose not to pursue. *See, e.g., United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1377-78 (D.C. Cir. 2000), *aff'd*, 322 F.3d 738 (D.C. Cir. 2003); John T. Boese & Beth C. McClain, *Why* Thompson *is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 ALA. L. REV. 1, 46 (1999). Allowing a relator to pursue claims based on discretionary statutes and regulations allows the *qui tam* relator to trump the government's discretion and put a court in the position of making decisions that should be left to an administrative agency. *See id.* at 49. For instance, in *United States ex rel. Windsor v. Dyncorp, Inc.*, 895 F. Supp. 844, 847 (E.D. Va. 1995), the trial court dismissed a *qui tam* relator's FCA allegation that a contractor had submitted false claims by asserting that it was in compliance with the Davis-Bacon Act when it knew it had misclassified workers. The court recognized that, pursuant to regulations implementing the Davis-Bacon Act, disputes between a contractor and the Department of Labor regarding the classification of employees are to be resolved by the agency after investigations and hearings. *Id.* at 851-52. Accordingly, "[t]o permit [the relator]'s claim to go to a jury would result in bypassing the carefully crafted administrative scheme for resolving [such] disputes." *Id.* at 852. Thus, the court granted the contractor's motion for summary judgment on all counts. *Id.* at 855.

As a result of *Hendow*, defense contractors may now risk FCA suits for every nominal regulation related in any way to a government contract by a third party who has no incentive to resolve issues consistent with the government's interest or the public good. "Relators who have no interest in the smooth execution of the Government's work have a strong dollar stake in alleging fraud whether or not it exists." 13 Op. Off. Legal Counsel 249 (1989). The District of Columbia Circuit has correctly assessed the dangers that flow from stepping into the shoes of the federal agency on these types of decisions via *qui tam* suits. It has stated:

> A court that found contracts invalid in a *qui tam* action where the government has not joined the plaintiff would have unilaterally divested the government of the opportunity to exercise precisely the discretion that is among the key differentiations of voidness from voidability: the discretion to accept or disaffirm the contract on the basis of complex variables reflecting the officials' views of the government's longterm interests.

Siewick, 214 F.3d at 1378. Through *Hendow*, the Ninth Circuit has significantly eroded that discretion to the detriment of the public good.

D. *Hendow* Will Increase the Costs of Government Procurement.

Hendow also will cause significant public harm by increasing the costs of government procurement without providing substantial benefit consistent with the purposes of the FCA. In the end, *Hendow* will only serve to drive responsible businesses away from the defense market and

increase the costs for the taxpayer for vital military goods and services.

Contractors will find it difficult and costly to prevent or defend the many claims that are sure to follow in the wake of the Ninth Circuit's significant blurring of the elements required to sustain an FCA action. Firms, faced with potentially unpredictable liabilities, will limit their dealings with the government or be forced to raise prices to compensate for the costs of litigation. *See generally* William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1839-40 (1996). Companies with important commercial technology needed by the military will choose not to enter government contracting. *See, e.g.*, William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 208 (1998) ("Firms that have achieved success in commercial markets will not deal with a seller whose requirements entail substantial costs, including nontrivial exposure to civil and criminal liability.").

In general, the costs of compliance by contractors are "ultimately absorbed by DoD in the form of increased unit costs for military equipment and services." Jeffrey A. Drezner et al., RAND Corp. Nat'l Def. Research Inst., *Measuring the Statutory and Regulatory Constraints on DoD Acquisitions* 13 (2006). The government may bear the costs of the increased number of lawsuits that would arise because of the Ninth Circuit's unwarranted FCA expansion. If a contractor successfully defends a case, those costs may be recoverable under its government contract. *See* 48 C.F.R. § 31.205-47(b)(2); *see also* Kovacic, *The Civil False Claims Act*, *supra*, at 226. Moreover, the increased risk of *qui tam* lawsuits and judgments from the *Hendow* decision

may ultimately be passed along to the government in the form of increased prices for goods and services. *See, e.g.*, *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-12 (1988) ("The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability . . . ").

CONCLUSION

For the reasons stated above, *Amicus Curiae* NDIA urges this Court to grant the University of Phoenix's Petition for a Writ of Certiorari, accept this case for review, and reverse the Ninth Circuit's decision in *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006).

Respectfully submitted,

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